Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term 1997

GENE SCHMIDT and PEGGY SCHMIDT, the heirs of Decedent STEPHANIE SCHMIDT and GENE SCHMIDT, the special administrator of her Estate, on behalf of STEPHANIE SCHMIDT,

Petitioners,

v.

HTG, INC., THOMAS E. HAMILTON, the STATE OF KANSAS, KANSAS DEPARTMENT OF CORRECTIONS, and ROBERT SCHIRK.

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Kansas

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the parents of a rape and murder victim may recover under Title 42 United States Code § 1983 against a State and/or its parole officer who knew of a recently released paroled offender's history, which included aggravated rape and sodomy, and believed that the college age waitresses with whom he worked were at a "high risk", but failed to follow a departmental policy which required him to notify the offender's employer, so that the victim, the offender's former fellow employee, remained unaware of the offender's proclivities and came to trust him.

2. Whether a parole officer's conduct is "reckless" and "conscience shocking" (as required pursuant to the holding in *Uhlrig v. Harder*, 64 F.3d 567 [10th Cir. 1995]) when the parole officer acknowledged that departmental policy required notification to employers when a third party was considered at risk and the parole officer

believed that third parties (i.e college age waitresses with whom the offender worked) were at such a high risk that he would not want his own 20 year old daughter around the offender, even if she knew of his past, yet that parole officer chose not to notify the waitresses, because he was concerned that doing such might cause the offender to lose his job.

3. Whether a parole officer's violation of his department's policy and of his common law "duty to warn" is deemed a discretionary act subject to qualified immunity pursuant to the holding in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

4. Whether co-employees are a "specifically definable group" that required notification as required pursuant to the holding in *Medina v. City and County of Denver*, 960 F.2d 1493 (10th Cir. 1992).

5. Whether a parole officer "created a danger" as required pursuant to the holding in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989) by allowing a "high risk" paroled sex offender to work with college age waitresses without warning the employer about the offender's criminal history, which included aggravated rape and sodomy.

6. Whether an employer has a duty to use due care in the hiring and retention of employees, whom it knew or should have known had dangerous propensities.

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OPINIONS BELOW

The opinion of the Kansas Supreme Court appears at Appendix A to this petition and has been designated for publication but is not yet reported.

JURISDICTION

The Kansas Supreme Court entered its judgment on June 5, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 in relevant part provides that "Every person who, under color or any statute, ordinance, regulation, custom, or usage, of any State subjects, or causes to be subjected, any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law."

STATEMENT OF THE CASE

Petitioners Gene and Peggy Schmidt, individually and as heirs of their daughter Stephanie Schmidt ("Stephanie"), and Gene Schmidt as administrator of her estate, brought personal injury and wrongful death actions against Stephanie's former employer, HTG, Inc. d/b/a Hamilton's Restaurant and Thomas E. Hamilton, the operator of the restaurant, (collectively "Hamilton Defendants") and the Kansas Department of Corrections ("KDOC"), State of Kansas and Robert Schirk ("Schirk"), a state parole officer (collectively "State Defendants"). On June 30, 1993, Stephanie was raped and killed by Donald Ray Gideon ("Gideon"), who had recently been conditionally released from prison by mandatory operation of law and was under the supervision of Schirk. Petitioners contended that Stephanie's death was a result of Schirk's failure to notify Hamilton, Gideon and Stephanie's employer, of Gideon's prior aggravated rape and sodomy and that the Hamilton Defendants negligently hired and retained Gideon as an employee. A 42 U.S.C. § 1983 claim was also made against the State Defendants.

The basis for Petitioners' claims against the State Defendants was that they created the danger for Stephanie, and the other college age waitresses with whom Gideon worked, by failing to warn them of the criminal record of Gideon, an individual, who by the State Defendants' own admission, was "highly likely to reoffend". Gideon, 31 years old at the time of his rape and murder of Stephanie, had spent about 95% of his life since the age of 12 in prison or another institution, had just been mandatorily released from prison, pursuant to state law, after serving half of his 20 year sentence for an aggravated rape and sodomy, in which he had used a razor blade against a young woman he had just met. He had no remorse for his actions. He started working at Hamilton's in December 1992.

Departmental policy required third party notification if a group of people, such as co-employees, were at risk. State Defendants have admitted in this case that co-employees were at risk. Despite this admission, a policy and a common law duty, enunciated in Restatement (Second) of Torts § 315 and § 319, Parole Officer Schirk failed to notify Gideon's employer because he was afraid that doing such *might* cost Gideon his job. Five months later, in May 1993, when Schirk acknowledged that notification would no longer even possibly cost Gideon his job, Schirk still failed to notify. Schirk has offered no explanation for this subsequent failure. Stephanie's employment at Hamilton's had terminated a few days prior to her rape and murder. She met some of the employees from Hamilton's for a celebration of her 20th birthday and was not feeling well. Gideon offered her a ride home, which she accepted as she had worked with him for seven months, during which time she and the other waitresses had grown to trust him.

He never took her home and instead raped and murdered her.

The State Defendants moved for summary judgment, essentially alleging there was no duty owed to Stephanie, causation was lacking, and the State Defendants were entitled to immunity under the Kansas Tort Claims Act (KTCA), K.S.A. 75-6101 et seq. The trial court granted the State Defendants' motion for summary judgment regarding the Schmidt's § 1983 claims as it did not feel that Schirk's conduct was "reckless" and "shocked the conscience", as required pursuant to the holding in *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995). The trial court denied the remaining summary judgment motions and allowed the state claim against the State Defendants to proceed as the court felt a "special relationship" existed between a parole officer and a parolee, which created a duty to warn others, pursuant to state court decisions which had found the existence of "special relationships" (*eg. Nero v. Kansas State University*, 253 Kan. 567, 571, 861 P.2d 768 [Kan. 1993], which recognized that a "special relationship" existed when one person was in charge of another with dangerous propensities), federal decisions (*Rieser v. District of Columbia*, 563 F.2d 462 [D.C. 1977], which specifically held that a "special relationship" exists between a parole officer and a parolee, thereby creating a duty on the parole officer to protect the parolee's potential victims and the Restatement (Second) of Torts § 315 (which acknowledges that a duty exists when one has a "special relationship" with a dangerous person or a potential victim) and § 319 (which acknowledges that a duty exists when one takes charge of a third person who is likely to cause bodily harm to others).

The basis for Petitioners' claim against the Hamilton Defendants was that they breached their duty of care to Stephanie and her co-workers by their actions in hiring and retaining Gideon as an employee. In December 1992 Hamilton hired Gideon to work at Hamilton's without doing any background check. Had he done such, he would have learned that Gideon had not worked for another company for the 10 years immediately preceding this contemplated employment, as Gideon had indicated on his employment application. Additionally, Gideon did not inform Hamilton of his prior incarceration and the fact that he was on parole. Hamilton remained unaware of Gideon's history and status until February 1993. At that time Gideon finally admitted his prior 10 year incarceration to Hamilton, however, Gideon lied again and indicated that he had been incarcerated due to a bar fight in which Gideon had severely beaten an individual with an ax. Gideon indicated that he told Hamilton this because he was concerned Gideon's sister would tell Hamilton such. Hamilton indicated that he was dubious of Gideon's claim that he had spent 10 years in prison for beating a man, but still did not inquire further. Hamilton then became aware that defendant Schirk was Gideon's parole officer, but made no inquiry of him.

During the course of Gideon's employment at Hamilton's and prior to Stephanie's rape and murder in June 1993, Hamilton was aware that Gideon had exhibited improper and inappropriate conduct toward women. For instance, Gideon told Hamilton that he told a woman that she had to have oral sex with him before she could leave his apartment; he had slapped a woman; and he had thrown a woman's purse down the stairs. Gideon also informed Hamilton that he had gotten into

a fight at a bar. Hamilton also knew that Gideon had been in trouble in his youth and had been in a youth home for kids due to disciplinary problems. Hamilton was aware that Gideon and the other co-employees socialized together outside of work and that the waitresses working at Hamilton's, including Stephanie,liked and trusted Gideon in that they considered him like a "big brother."

The Hamilton Defendants moved for summary judgment which the trial court denied as it found that employers must use reasonable care in hiring and retaining employees.

The trial court granted permission for the defendants to file an interlocutory appeal and for the Schmidts to file their cross-appeal. These cases were consolidated and transferred to the Kansas Supreme Court under K.S.A. 20-3018(c).

With respect to the claims against the State Defendants, the Kansas Supreme Court rejected the law in other jurisdictions (*Taggart v. State*, 118 Wash. 2d 195, 223, 822 P.2d 243 [1992]; *Division of Corrections v. Neakok*, 721 P.2d 1121 [Alaska 1986]; *Rieser v. District of Columbia*, 563 F.2d 462 [D.C. 1977]; *Thompson v. County of Alameda*, 614 P.2d 728 [California 1980]; and *Bonnie W. v. Commonwealth*, 643 N.E.2d 424 [Mass. 1994] and chose to follow what it considered to be the better reasoned decisions from other jurisdictions. In doing such, the court found that Petitioners' state claims must fail because the State Defendants did not have any duty to the Petitioners, as the court felt 1) there was no proof that the state actor was aware of a risk so great that it was highly probable that injuries would follow or that the

state actor proceeded in conscious disregard of a known danger, and 2) decedent, as a co-employee, was not a member of a specifically definable group, as required pursuant to the holding in *Medina v. City and County of Denver*, 960 F.2d 1493 (10th Cir. 1992). Additionally, the court found that the § 1983 claims must fail as the state actors' actions did not shock the conscience and were not reckless. Accordingly, the Kansas Supreme Court sustained the § 1983 summary judgment ruling in favor of the State Defendants and reversed the summary judgment ruling in favor of Petitioner with respect to the Petitioners' state claim.

With respect to the claims against the Hamilton Defendants, the Kansas Supreme Court chose not to follow the law in numerous jurisdictions (*Gaines v. Monsanto Co.*, 655 S.W.2d 568 [Mo.App.1983]; *Svacek V. Shelley*, 359 P.2d 127 [Alaska 1961]; *Kassman v. Busfield, Enterprises, Inc.*, 131 Ariz. 163, 639 P.2d 353 [App. 1981]; *Colwell v. Oatman*, 32 Colo.App. 171, 510 P.2d 464 [1973]; *Shore v. Town of Stonington*, 187 Conn. 147, 444 A.2d 1379, 1383 [1982]; *Williams v. Feather Sound, Inc.*, 386 So.2d 1238 [Fla.Dist.Ct.App.1980]; *Edwards v. Robinson-Humphrey Co.*, 164 Ga.App. 876, 298, S.E.2d 600 [1982]; *Easley v. Apollo Detective Agency, Inc.*, 69 Ill.App.3d 920, 26 Ill. Dec. 313, 320, 387 N.E.2d 1241, 1248 [1979]; *Hersh v. Kentfield Builders, Inc.*, 385 Mich. 410, 189 N.W.2d 286 [1971]; *DiCosala v. Kay*, 91 N.J. 159, 450 A.2d 508 [1982]; *F. & T. Co. v. Woods*, 92 N.M. 697, 594 P.2d 745 [1979]; *Thahill Realty Co. v. Martin*, 88 Misc.2d 520, 388 N.Y.S.2d 823 [1976]; *Weiss v. Furniture in the Raw*, 62 Misc.2d 283, 306 N.Y.S.2d 253 [1969]; *Dayton Hudson Corp. v. American Mutual Liability Insurance Co.*, 621 P.2d 1155, 1161 [Okl.1980]; *Dempsey v. Walso Bureau, Inc.*, 431 Pa.562, 246 A.2d 418 [1968]; *Coath v. Jones*, 277 Pa.Super.

479, 419 A.2d 1249 [1980]; *Estate of Arrington v. Fields*, 578 S.W.2d 173 [Tex.Civ.App.1979]; *Stone v. Hurst Lumber Co.*, 15 Utah 2d 49, 386 P.2d 910 [1963]; and *LaLone v. Smith*, 39 Wash.2d 167, 234 P.2d 893 [1951]) and to distinguish its own precedent (*Hollinger v. Jane C. Stormont Hospital and Training School for Nurses*, 2 Kan.App.2d 302, 578 P.2d 1121 [1978]; *Balin v. Lysle Rishel Post No. 68*, 177 Kan. 520, 280 P.2d 623 [Kan. 1955]; *Stricklin v. Parsons*, 388 P.2d 824 [Kan. 1964]) and found that employers are not required to ascertain the detailed history of every employee, nor must they terminate the employment of an individual who is performing acceptable services and is clearly not unfit or incompetent, but who does pose some degree of risk due to previous actions. Accordingly, the Kansas Supreme Court reversed the summary judgment rulings against the Hamilton Defendants.

REASONS FOR GRANTING THE WRIT

A. NEED FOR NATIONWIDE STANDARDS

There are several issues raised in this case which have never been ruled upon by this Court and thus, need approval, rejection or clarification by this Court so that nationwide standards and guidelines are clearly established.

1. May Parole Officers Be Liable for Tortious Acts of a Parolee Where He Had an Opportunity to Prevent Those Acts by Sharing Information?

It is well established by this Court that under certain circumstances a state actor may be held liable for the tortious acts of dangerous persons pursuant to 42

U.S.C. § 1983. See *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). See also *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989); *Cornelius v. Town of Highland Lake, Alabama*, 880 F.2d 348 (11th Cir. 1989); *Doe v. United Social and Mental Health Services, Inc.*, 670 F.Supp. 1121 (D. Conn. 1987); *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995); *Medina v. City and County of Denver*, 960 F.2d 1493 (10th Cir. 1992); and *Beck v. Kansas University Psychiatry Foundation*, 671 F.Supp. 1563 (D.Kan. 1987). This is commonly known as the "special danger" or "danger creation" theory of liability. Prior to *DeShaney v. Winnebago County Department of Social Services, supra,* this was sometimes referred to as creating a "special relationship" between the state actor and the potential victims. Under the "special danger" or "danger creation" theory established in *DeShaney*, liability is almost entirely based on foreseeability of harm to the plaintiff as a member of a specifically definable group (and thus faced a "special danger" of harm apart from the public) as opposed to the risk faced by the public at large. *Id.*

Subsequent to *DeShaney*, the Tenth Circuit Court of Appeals in *Medina v. City and County of Denver, supra*, succinctly stated the four elements necessary for proving a "special danger" or "danger creation" claim under 42 U.S.C. §1983 :

> "(1) the plaintiff is a member of a limited and specifically definable group;
> (2) the defendant's conduct specifically put the members of that group at substantial risk of serious, immediate, and proximate harm;
> (3) the risk was obvious or known; and
> (4) the defendant acted recklessly in conscious disregard of that risk."

Id. at 1496. "To satisfy these elements, a defendant must have actual or constructive awareness of the gravity of the risk, including its effect on a limited and specifically definable group." *Id.* Significantly, the court found that the facts in the case were enough to overcome a motion for summary judgment. *Id.* at 1497.

In *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995), the Tenth Circuit held, that in addition to the four factors espoused in *Medina supra*, the facts must show that defendant's conduct, when viewed in total shocks the conscience. *Id.* at 574. The *Uhlrig* court based this on the this Court's decision in *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 126, (1992), stating that the Due Process Clause protects persons from "deliberately wrongful government decisions...." *Id.* at 573.

The *Medina* and *Uhlrig* decisions now need ratification or rejection by this Court so that other courts will know if and when parole officers can be held liable if they fail to protect "a member of a limited and specifically definable group" and whether the plaintiff must prove that the defendant's conduct "shocks the conscience" and if so what constitutes such.

In the case of *Humann v. Wilson*, 696 F.2d 783, 784 (10th Cir. 1983), the Tenth Circuit implied that corrections officials may be liable if a plaintiff faced a special danger from the public at large, i.e., if there was a specifically definable group.

However, in the instant case, the Kansas Supreme Court held that a parole officer is <u>never</u> liable to a parolee's victim because no "special relationship" exists between either a parole officer and a parolee or between

a parole officer and a third party at risk, even if the third party is a member of a specifically definable group, such as co-employees.

The Kansas Supreme Court was troubled by the following:

1) If notification was required to co-employees, it would also be required to other groups such as "those living in Gideon's apartment building or neighborhood, woman Gideon dated, and regular patrons at bars Gideon frequented." (at page 13).

Clear guidelines should be established by this Court as to what constitutes a "specifically definable group" as set forth in Medina and specifically whether co-employees constitute a specifically definable group.

2) The state cannot be the virtual guarantor of the safety of each of its citizens from illegal and unlawful actions of every parolee.

This Court should clarify the circumstances, if any, under which a parole officer will be liable for foreseeable acts of parolees upon specifically definable groups of victims.

3). There was no specific threat of harm to the injured party.

This Court should clarify whether a parole officer is liable, in the absence of a specific threat of harm to the injured party, for failing to warn a specifically definable group of victims of a foreseeable danger of which the victim is not aware. This Court should determine whether the civil courts should recognize what virtually every state in the

union has recognized when they enacted sexual registration laws, i.e., that sex offenders rarely fire warning shots as they need to gain the trust of their victims and thus, notification to unaware potential victims is necessary to protect the public. If this Court recognized these statistically supported facts pertaining to the habits and conduct of sex offenders, then victims would not be denied redress in the courts, due to the fact that a danger was not considered by a court to be foreseeable merely because a parolee failed to fire a warning shot by making a prior specific threat to the victim.

4. An independent duty must exist independent of a departmental policy.

This Court must determine whether a departmental policy can create a duty and when a parole officer has a duty to a victim.

5. Schirk's conduct was not reckless and conscience shocking as required in *Uhlrig* and *Medina*.

Clear guidelines of what constitutes reckless and conscience shocking behavior are direly needed by the trial judges deciding these case day by day. If there is no standard or test, then what is considered reckless and conscience shocking to one, may not even raise an eyebrow of another.

2. What Constitutes "Danger Creation" Under *DeShaney*?

As a result of the facts underlying this case (i.e., the tragic rape and murder of Stephanie Schmidt by a former co-employee), Kansas adopted a sexual registration act (K.S.A. 22-4901 et seq.,) the constitutionality of which was upheld by the Kansas

Supreme Court in *State of Kansas v. Myers*, 260 Kan 669, 923 P2d 1024 (1996). Virtually every state in the union has adopted a similar act. The essence of these acts are that released sex offenders must register with the police departments in the area in which they live and that this information can be published in local newspapers. The reasoning behind such laws is that experts and correctional departments nationwide agree that sex offenders typically look and act normal, yet pose a great danger to uninformed and trusting people that are around them, such as co-employees and neighbors.

State legislatures have decided that the public has a "right to know" and a need to know when a sex offender is in the area in order to be able to take appropriate precautions and protect themselves. Without such a warning, a danger has been created, just as the placement of an electrical transformer in a back yard, while obviously necessary, creates a danger unless a warning is placed upon it.

Clarification is now needed by this Court concerning whether the failure to warn female co-employees that they are working with a recently released violent sex offender constitutes the "creation of a danger" as discussed in *DeShaney*.

In *State of Kansas v. Hendricks*, _____, U.S. ____, 117 S. Ct. 2072 (1997), this Court upheld the constitutionality of Kansas's Sexual Predator Law (K.S.A. 59-29a01 et seq.), which was also enacted as a result of the underlying facts of this case. In doing such, this Court acknowledged that sex offenders often times are not "cured" in prison, and thus create a danger, when they are released from prison, especially for those with whom they

are in close contact. This Court now needs to determine when, if ever, it is foreseeable that a paroled sex offender poses an unreasonable risk of harm to a group of people, such that it is actionable for a parole officer to fail to warn that group.

3. Are parole officers entitled to qualified immunity when they violate departmental policy and common law duties to warn?

This Court has held that "[g]overnment officials performing discretionary functions, generally are shielded from liability for civil damages if their conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, (1982). In *Martinez v. California*, 444 U.S. 277 (1980), this Court held open the question of "what immunity, if any, a state parole officer has in a § 1983 action where a constitutional violation is made out by the allegations." (at page 285, footnote 11). Since the *Martinez* decision, several jurisdictions have denied the defense of qualified immunity to parole officers. *See, Doe v. United Social and Mental Health Services, Inc.*, 671 F.Supp. 1121 (D.Conn. 1987); *Cornelius v. Town of Highland Lake, Alabama*, 880 F.2d 348 (11th Cir. 1989); *Beck v. Kansas University Psychiatry Foundation*, 671 F.Supp. 1563 (D.Kan. 1987); *Humann v. Wilson*, 696 F.2d 783, 784 (10th Cir. 1983) (where the court implied that corrections officials may be liable if the plaintiff faced a special danger from the public at large). This Court must now decide whether parole officers are protected from liability by qualified immunity.

Harlow, supra also held that state or government officials are only entitled to qualified immunity for

discretionary acts. Thus, this Court also needs to resolve the issue as to whether failing to follow a mandatory department policy (i.e. if third parties are at risk, and it is admitted they were, then the third parties must be notified) is a discretionary act entitled to the protection of qualified immunity.

In *Howard v. Adkison*, 887 F.2d 134 (8th Cir. 1989), the Eighth Circuit addressed the issue and held that "[q]ualified immunity is not available to all government officials acting within the scope of their employment. It is only for those officials who possess the discretion to decide matters in the name of the public interest." (Emphasis added) *Id.* at 140. The court held, contrary to the Kansas Supreme Court in the instant case, that government officials who ignore applicable policies or are not authorized to act as they did are not performing discretionary acts and, therefore, are not entitled to qualified immunity. *Id.* Moreover, the Eight Circuit held that simply because government officials "may have possessed some decision-making power as a result of their position" does not grant an official qualified immunity for his actions which were contrary to policy or not authorized. *Id.* Thus, there are inconsistent rulings between Kansas and the Eighth Circuit that need to be resolved by this Court.

4. Are employers liable for the negligent hiring and retention of employees?

It has long been the law in Kansas and other jurisdictions that an employer may be liable for the injuries caused by his employee if the employer negligently hires or retains an employee whom the employer should have known had dangerous proclivities.

(See *Hollinger v. Jane C. Stormont Hospital and Training School for Nurses*, 2 Kan.App.2d 302, 578 P.2d 1121 [1978]; *Balin v. Lysle Rishel Post No. 68*, 177 Kan. 520, 280 P.2d 623 [Kan. 1955]; *Stricklin v. Parsons*, 388 P.2d 824 [Kan. 1964]; *Gaines v. Monsanto Co.*, 655 S.W.2d 568 [Mo.App.1983]; *Svacek V. Shelley*, 359 P.2d 127 [Alaska 1961]; *Kassman v. Busfield, Enterprises, Inc.*, 131 Ariz. 163, 639 P.2d 353 [App. 1981]; *Colwell v. Oatman*, 32 Colo.App. 171, 510 P.2d 464 [1973]; *Shore v. Town of Stonington*, 187 Conn. 147, 444 A.2d 1379, 1383 [1982]; *Williams v. Feather Sound, Inc.*, 386 So.2d 1238 [Fla.Dist.Ct.App.1980]; *Edwards v. Robinson-Humphrey Co.*, 164 Ga.App. 876, 298, S.E.2d 600 [1982]; *Easley v. Apollo Detective Agency, Inc.*, 69 Ill.App.3d 920, 26 Ill. Dec. 313, 320, 387 N.E.2d 1241, 1248 [1979]; *Hersh v. Kentfield Builders, Inc.*, 385 Mich. 410, 189 N.W.2d 286 [1971]; *DiCosala v. Kay*, 91 N.J. 159, 450 A.2d 508 [1982]; *F. & T. Co. v. Woods*, 92 N.M. 697, 594 P.2d 745 [1979]; *Thahill Realty Co. v. Martin*, 88 Misc.2d 520, 388 N.Y.S.2d 823 [1976]; *Weiss v. Furniture in the Raw*, 62 Misc.2d 283, 306 N.Y.S.2d 253 [1969]; *Dayton Hudson Corp. v. American Mutual Liability Insurance Co.*, 621 P.2d 1155, 1161 [Okl.1980]; *Dempsey v. Walso Bureau, Inc.*, 431 Pa.562, 246 A.2d 418 [1968]; *Coath v. Jones*, 277 Pa.Super. 479, 419 A.2d 1249 [1980]; *Estate of Arrington v. Fields*, 578 S.W.2d 173 [Tex.Civ.App.1979]; *Stone v. Hurst Lumber Co.*, 15 Utah 2d 49, 386 P.2d 910 [1963]; and *LaLone v. Smith*, 39 Wash.2d 167, 234 P.2d 893 [1951])

In the instant case the Kansas Supreme Court chose not to follow the precedent established in other jurisdictions and to distinguish its own precedent. Thus, clear nationwide standards are needed so that inconsistent rulings do not exist from state to state.

B. IMPORTANCE

This is a case about victims' rights versus criminal rights. Clearly, a paroled offender does not have the same rights as other citizens. This Court needs to decide whether parole officers can be held liable for the intentional criminal acts of the parolee they supervise when they know that the parolee poses a danger to a specifically definable group of individuals, yet fail to warn these individuals despite a duty to do so under their own departmental policies and the common law duties created by the Restatement (Second) of Torts § 315 which provides as follows:

> "There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection."

and by the Restatement (Second) of Torts § 319 which provides as follows:

> "*Duty of Those in Charge of Person Having Dangerous Propensities:* One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."

If parole officers are not liable under these circumstances,

then this Court needs to clarify precisely what conduct will or will not be actionable.

CONCLUSION

The Kansas Supreme Court acknowledged that the law on the issues before it varied from jurisdiction to jurisdiction. This Court must establish nationwide standards and levels of conduct for parole officers and employers so that victims in some states do not have redress for the wrongs committed against them, while victims in other states have redress for the identical acts.

Respectfully submitted,

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APPENDIX A

SCHMIDT, et al.,
Appellees/Cross-appellants,
v.
HTG, INC., et al.,
Appellants/Cross-appellees.
Nos. 79039, 79,040.
Supreme Court of Kansas.
June 5, 1998.

Syllabus by the Court

1. When a 42 U.S.C. § 1983 (1995) claim is asserted, a State actor may not generally be held liable under the Due Process Clause of the United States Constitution for private misdeeds. The elements necessary to prove one of the recognized exceptions to this rule, the danger creation theory, are: (1) The plaintiff/victim must be a member of a limited and specifically definable group; (2) the defendant's conduct specifically put members of that group at substantial risk of serious, immediate, and proximate harm; (3) the risk was obvious or known; (4) the defendant acted recklessly in conscious disregard of that risk; and, (5) the conduct, when viewed in the totality of the circumstances, is shocking to the conscience.

2. Under the facts of this case, the trial court properly determined that the State actor's conduct was not reckless and did not shock the court's conscience, as there was no proof that the State actor was aware of a risk so great that it was highly probable that the injuries would follow or that the State actor proceeded in conscious disregard of a known danger.

3. Negligence only exists where there is a duty owed by one person to another and a breach of that duty occurs. In order to recover, one must show a causal connection between a duty breached and an injury received.

4. Generally, in the absence of a "special relationship," one has no duty to control the conduct of a third party to prevent harm to others. A special relationship may exist, however, with persons in charge of one with dangerous propensities or persons with custody of another.

5. One who takes charge of a third person whom he or she knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

6. A parole officer does not take charge or exercise control over a parolee so as to create a special relationship between the officer and the parolee, thereby imposing a duty upon the State to control the conduct of the parolee to prevent harm to other persons or property. The State is not the virtual guarantor of the safety of each and every one of its citizens from illegal and unlawful actions of every parolee or person released from custody under any type or kind of supervision.

7. In the absence of a specific threat of harm, the State has no common-law duty to warn third parties of the dangerous propensities of parolees.

8. Liability cannot be established by the failure to follow a written personnel policy unless an independent duty of care is owed to the injured party.

9. Although an employer may be liable for injuries to a third person which are the result of the incompetence or unfitness of an employee where the employer was negligent in employing or retaining the employee when the employer knew or should have known of such incompetence or unfitness of the employee, liability normally only attaches to acts occurring at the employer's business location or committed during the conduct of the employer's business.

10. In order to find an employer liable for negligently hiring or retaining an employee, there must be some causal relationship between the dangerous propensity or quality of the employee, of which the employer has or should have knowledge, and the injuries suffered by the third person; the employer must, by virtue of knowledge of the employee's particular quality or propensity, have
reason to believe that an undue risk of harm exists to others as a result of continued employment of that employee; and the harm which results must be within the risk created by the known propensity.

11. Employers are not required to ascertain the detailed history of every employee, nor must they terminate the employment of an individual who is performing acceptable services and is clearly not unfit or incompetent, but who does pose some degree of risk due to previous actions.

Appeal from Crawford district court; DONALD R. NOLAND, judge. Affirmed in part and reversed in part.

Donald Patterson, of Fisher, Patterson, Sayler & Smith, Overland Park, argued the cause, and Michael K. Seck, of the same firm was on the briefs, for appellants/cross-appellees HTG, Inc. d/b/a Hamilton's and Thomas E. Hamilton.

Lisa A. Mendoza, Special Assistant Attorney General, argued the cause, and Edward F. Britton, Jr., of Kansas Department of Corrections, was on the briefs, for appellants/cross-appellees Kansas Department of Corrections and Robert Schirk.

Timothy A. Short, of Spigarelli, McLane, & Short, of Pittsburg, and James F. Adler, of Adler & Manson, L.C., Kansas City, MO, argued the cause, and Carlton Kennard, Esq., Pittsburg, was with them on the briefs, for appellees/cross- appellants.

LARSON, Justice:

Gene and Peggy Schmidt, individually and as heirs of their daughter Stephanie Schmidt, and Gene as administrator of her estate, brought these personal injury and wrongful death actions against Stephanie's former employer, HTG, Inc. d/b/a Hamilton's, Thomas E. Hamilton, the Kansas Department of Corrections (KDOC), and Robert Schirk, a state parole officer. On June 30, 1993, Stephanie was raped and killed by Donald Ray Gideon, who had been conditionally released from prison by mandatory operation of law and was under the supervision of Schirk. The Schmidts contend that Stephanie's death was a result of the KDOC's and Schirk's failure to notify Hamilton, Gideon's employer, of defendant's prior convictions for rape and aggravated sodomy and that Hamilton negligently hired and retained Gideon as an employee. A 42 U.S.C. § 1983 (1995) claim was also made against the KDOC and Schirk.

The defendants moved for summary judgment, essentially alleging there was no duty owed to Stephanie, causation was lacking, and the KDOC and Schirk were entitled to immunity under the Kansas Tort Claims Act (KTCA), K.S.A. 75-6101 et seq. The trial court granted Schirk and the KDOC summary judgment regarding the Schmidts' § 1983 claims, but denied the remaining summary judgment motions. The trial court granted permission for the defendants to file an interlocutory appeal and for the Schmidts to file their cross-appeal. The cases were consolidated and transferred to us pursuant to K.S.A. 20-3018(c).

Factual Statement

Donald Ray Gideon was conditionally released from prison by mandatory operation of law on November 5, 1992, having served approximately 10 years in prison for convictions of aggravated rape and sodomy of a young college woman. Prior to his mandatory release, Gideon had been denied parole at every prior parole hearing. Gideon completed the Sexual Offender Treatment Program while incarcerated.

Gideon was supervised by Robert Schirk. Schirk had worked for the KDOC for 12 years as a parole officer and had completed its basic and annual training requirements. He had previously supervised other sex offenders.

Schirk completed a Risk and Needs Assessment of Gideon to determine his level of risk and likelihood of reoffending and to establish the level of supervision he required. Gideon was assessed as high risk, although the KDOC policy so classifies all sex offenders.

When released, Gideon signed a conditional release certificate imposing certain conditions on his release. In addition to these requirements, Schirk ordered Gideon to meet with a mental health therapist and to obtain employment. Schirk possessed the inherent authority to impose additional conditions of release if warranted.

In 1992 and 1993, the KDOC had an unwritten policy which required the parole officer to give notice of a parolee's criminal history to any third party who was determined, in the parole officer's discretion, to be at risk through association with a parolee. The present policy regarding third-party notification has been reduced to writing and requires employer notification of a parolee's criminal history.

HTG, Inc. d/b/a Hamilton's opened for business in Pittsburg, Kansas, in December 1992. Hamilton had

agreed to manage the restaurant for HTG, Inc. Hamilton hired and fired all employees of the restaurant. He had extensive experience in the food service industry and had hired approximately 1,000 employees. He had never run a records check on any potential employee, nor had he ever fired, or been told to fire, anyone for falsifying an employment application.

Gideon initially was employed at Superior Industries but quit soon thereafter. Gideon then obtained employment at Hamilton's Restaurant in December 1992, without any involvement of Schirk. Gideon did not inform Hamilton of defendant's criminal record or tell him he was on parole. Hamilton did not run a background check on Gideon before hiring him, nor did he check Gideon's references or employment history.

Hamilton also hired Stephanie, a Pittsburg State University student, who started working in December 1992. She remained employed until mid-June 1993, when she left Hamilton's after a dispute and did not return.

In February 1993, Gideon admitted to Hamilton he had been in prison and was on parole. Gideon lied to Hamilton and stated he had been incarcerated as a result of a bar fight where he had severely beaten a man with an axe handle. Hamilton never attempted to verify this story, which eventually became generally known by the other employees at Hamilton's, including Stephanie.

Hamilton learned Gideon had a parole officer and was attending counseling. Gideon informed Schirk that Hamilton knew he was on parole, but Schirk never contacted Hamilton to determine if the information divulged was correct. Hamilton had a chance meeting with Schirk at a convenience store in May or June 1993, in which Hamilton told Schirk that Gideon was doing fine at his job. Hamilton did not inquire about Gideon's conviction, nor did Schirk volunteer any information.

Hamilton never received any complaints from his employees concerning Gideon's conduct. Gideon was polite, dependable, and soft-spoken, and the waitresses seemed to like him. Stephanie told her father that Gideon was nice to her, never tried to hit on her, helped protect the waitresses' tips, and that she trusted him. Hamilton also trusted Gideon, permitting his two sons to work in the restaurant and allowing Gideon to transport his fiancee and daughter to work.

Gideon once told Hamilton he had slapped a woman for insulting him and thrown her purse down the stairs. He also informed Hamilton he had told a woman to leave his apartment unless she had oral sex with him. On one occasion, Hamilton gave Gideon a day off work after he had been involved in a fight at a local tavern.

Schirk never informed Hamilton or any of the restaurant employees that Gideon was a paroled sex offender and stated he did not disclose this information because he was concerned Gideon would be fired. Schirk's goal was to assist Gideon in reintegrating into society, and Schirk believed society is better protected from recidivism by ensuring that parolees are employed and self-supporting. By May 1993, Schirk no longer believed Gideon would lose his employment if he informed Hamilton of Gideon's past criminal history.

Hamilton stated he would have informed Schirk of Gideon's inappropriate conduct if he had been aware of Gideon's actual criminal history. Hamilton indicated he would not have initially hired Gideon had he been aware of Gideon's true criminal history and would have informed his employees about it had he later been informed.

Schirk believed Gideon was adequately complying with the conditions of his parole. Gideon reported to Schirk as directed, maintained employment, attended

counseling, made restitution and costs payments, and reported pending leisure time in appropriate pursuits. In May 1993, Gideon's supervision status was relaxed to "intermediate." Schirk indicated he might have requested the revocation of Gideon's parole had he known of the incidents of inappropriate conduct with women which Gideon had described to Hamilton.

Schirk was aware that young women were employed at Hamilton's. He acknowledged that female employees of Hamilton's were at a risk of harm due to their association with Gideon, although Schirk specifically stated he "did not feel that there was a third party at risk."

On the night of June 30, 1993, Stephanie and several friends went to a bar in Frontenac, Kansas, to celebrate her birthday. Gideon was at the bar. Stephanie became ill and accepted a ride home from Gideon. She was never again seen alive.

In the Schmidts' personal injury and wrongful death suit, they alleged the Hamilton defendants breached a duty owed to Stephanie and to them by negligently hiring and retaining Gideon as an employee at Hamilton's. The Schmidts claimed the State defendants breached both a common-law duty and KDOC policy by failing to warn Hamilton of Gideon's criminal history. The Schmidts also made 42 U.S.C. § 1983 claims against Schirk and the KDOC.

In denying motions for summary judgment, the trial court ruled against the Hamilton defendants as to their claims that they owed no duty to Stephanie or the Schmidts and that the breach of any such duty did not proximately cause the Schmidts' injuries. The court also determined that a special relationship existed between the State defendants and Gideon, in addition to KDOC policy, giving rise to a duty to warn, and rejected the State defendants' claims to immunity under the KTCA. The

court did reject the Schmidts' § 1983 claims, holding the record did not support a showing of reckless conduct under the totality of the surrounding circumstances such that the court's conscience was shocked.

The trial court issued a K.S.A. 60-2102(b) order that its rulings on the summary judgment motions involved controlling questions of law as to which there is a substantial ground for difference of opinion such that an immediate appeal would materially advance the termination of litigation. The Hamilton and State defendants all appeal their adverse rulings. The Schmidts cross-appeal the dismissal of their § 1983 claims. The Court of Appeals granted permission to take the interlocutory appeals.

Standard of review:

A party is entitled to summary judgment if "there is no genuine issue as to any material fact and ... the moving Party is entitled to judgment as a matter of law." K.S.A. 60-256(c).

"Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case." Mitzner v. State Dept. of SRS, 257 Kan. 258, 260, 891 P.2d 435 (1995).

We are obligated on appeal to resolve all facts and inferences reasonably drawn from the evidence in favor of

the party against whom summary judgment was entered. Summary judgment should be denied where reasonable minds could differ as to the conclusions to be drawn from the evidence. Gragg v. Wichita State Univ., 261 Kan. 1037, 1044, 934 P.2d 121 (1997).

The trial court's rulings that the State defendants and Hamilton's owed a recognizable duty to Stephanie and that Schirk and the KDOC were not immune from liability under exceptions to the KTCA are all questions of law. See Gragg, 261 Kan. at 1044, 934 P.2d 121; Bolyard v. Kansas Dept. of SRS, 259 Kan. 447, 451, 912 P.2d 729 (1996). We have unlimited review of questions of law. T.S.I. Holdings, Inc. v. Jenkins, 260 Kan. 703, 716, 924 P.2d 1239 (1996).

§ 1983 claims

In granting summary judgment in favor of the KDOC and Schirk on the Schmidts' § 1983 claims, the trial court first noted that the Schmidts acknowledge their § 1983 claim against the KDOC is not presently allowed under the law. The trial court then held that as to the § 1983 claim against Schirk, the Schmidts had been unable to prove that their claim fell within one of the exceptions to the general rule that a State actor may not be held liable under the Due Process Clause to the United States Constitution for private misdeeds. Citing DeShaney v. Winnebago Cty. Dept. Soc. Servs. Dept., 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), the court noted that the two recognized exceptions are: (1) the special relationship doctrine, and (2) the danger creation theory. Both the Schmidts and the trial court focused exclusively on the second exception, recognizing that the first was not applicable.

Federal courts have established the elements

necessary for proving this second exception: (1) The plaintiff/victim must be a member of a limited and specifically definable group; (2) the defendant's conduct specifically put members of that group at substantial risk of serious, immediate, and proximate harm; (3) the risk was obvious or known; (4) the defendant acted recklessly in conscious disregard of that risk; and (5) the conduct, when viewed in the totality of the circumstances, is shocking to the conscience. Collins v. Harker Heights, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992); Medina v. City and County of Denver, 960 F.2d 1493 (10th Cir.1992).

The trial court decided that Schirk's conduct did not meet the elements of the danger creation theory primarily because it found his conduct was not reckless or shocking to its conscience. The court held:

"Although plaintiffs argue quite strongly that Schirk's conduct was reckless, the Court disagrees. Arguably Schirk's conduct is actionable in the traditional 'tort' sense of the word, yet the Court does not find that the record supports a showing of reckless conduct. That is, the plaintiffs have failed to demonstrate that Schirk was aware of a risk to Ms. Schmidt so great that it was highly probable that serious harm would occur. Nor have the plaintiffs demonstrated that Schirk proceeded in a conscious and unreasonable disregard of probable consequences with an intent to harm or an intent to place Ms. Schmidt in an unreasonable risk of harm. Again, it can perhaps be argued that Schirk's conduct was negligent, yet the complained of conduct falls short of that which is contemplated by a Section 1983 claim.

"The facts which were developed in the discovery phase support this conclusion. Undeniably Schirk was aware that sex offenders are at a high risk of re-offending. A logical extension of this awareness would be the

knowledge that Gideon's female co-employees were at risk. Yet Schirk at that point in time had been given no reason to believe that Gideon was engaging in any inappropriate behavior which focused on the Hamilton waitresses. Gideon reported to Schirk as ordered, indicated no problems at work, and had maintained the same job for seven months. There was nothing about Gideon's known conduct which would indicate to Schirk that the Hamilton waitresses were in specific danger of imminent harm. Accordingly, the plaintiffs have been unable to demonstrate either an intent to harm or an intent to place a person unreasonably at risk of harm, as per the requirement of Medina, supra.

"As previously noted, the Court is required to consider the totality of the surrounding circumstances in ruling on the propriety of a Section 1983 claim. [Citation omitted.] In doing so, the Court notes that Schirk's role in the supervision of Gideon involved the balancing of competing interests: the protection of the public versus the rehabilitation of the offender. This at times is a difficult balancing act to accomplish. The Court has closely scrutinized Schirk's actions in fulfilling this role.

The Court does not find that Schirk's errors, if any, are so egregious and outrageous that the Court's conscience is shocked."

The Schmidts have extensively briefed this issue and have argued that the facts of this case are comparable to many cases where § 1983 liability was imposed and distinguishable from many cases where no liability was found. We hold, however, that the trial court's analysis of this issue was sound and correct.

The trial court focused on the definition of reckless conduct "as an awareness or knowledge of an 'obvious risk that was so great that it was highly probable that serious harm would follow and he or she proceeded in conscious

and unreasonable disregard of the consequences.' Medina, [960 F.2d at] 1496." Further, the court, citing Collins, 503 U.S. at 127-28, noted the shocking to the conscience standard cannot be met by ordinary negligent conduct, but rather presupposes deliberate wrongful decisions that must be more than an ordinary tort to be actionable.

In the present case, as will be further discussed, we find that Schirk owed no duty to warn Stephanie's employer of Gideon's criminal history and dangerous propensities such that liability could be imposed on a theory of negligence. As Schirk's conduct is not deemed to be negligent, it is not possible for this same conduct to be considered reckless and shocking to the conscience. Although the end result was clearly tragic, the Schmidts have failed to establish that Schirk was aware of an obvious risk so great that it was highly probable that the attack upon Stephanie would follow. Schirk most definitely did not intend any harm to come to Stephanie or Gideon's other co-workers. In light of the knowledge he possessed pertaining to Gideon's conduct during his 7 months of employment at Hamilton's, Schirk did not proceed in conscious disregard of an obvious danger.

We affirm the trial court's grant of summary judgment on the § 1983 claims.

Duty--State defendants

The KDOC and Schirk allege that under Kansas case law, they owed no duty to warn of Gideon's criminal history and possible danger to young women. The Schmidts claimed in their petition that Schirk owed a duty to warn Hamilton, Gideon's employer, of Gideon's prior crimes, and that the breach of this duty proximately caused their injuries.

The trial court held that because Gideon was a

parolee under the direct supervision of Schirk, a special relationship existed such that Schirk had a duty to warn readily identifiable groups of potential victims. Further, the court noted that because the KDOC had adopted an unwritten policy of warning individuals potentially at risk, it was required to administer the policy in an effective manner.

We have repeatedly stated that negligence only exists where there is a duty owed by one person to another and a breach of that duty occurs. In order to recover, one must show a causal connection between a duty breached and an injury received. Durflinger v. Artiles, 234 Kan. 484, 488, 673 P.2d 86 (1983).

"In Kansas negligence is never presumed. Blackmore v. Auer, 187 Kan. 434, 440, 357 P.2d 765 (1960). This court in Blackmore commented it may be said negligence is the failure to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand, as a result of which such other person suffers injury. 187 Kan. at 440, 357 P.2d 765. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. In every instance, before an act is said to be negligent, there must exist a duty to the individual complaining, the observance of which would have averted or avoided the injury.... An act is wrongful, or negligent, only if the eye of vigilance, sometimes referred to as the prudent person, perceives the risk of damage. The risk to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension. [Citation omitted.] The existence of negligence in each case must depend upon the particular circumstances which surrounded the parties at the time and place of the occurrence on which the controversy is based." Durflinger,

234 Kan. at 488-89, 673 P.2d 86.

Generally, in the absence of a "special relationship," there is no duty to control the conduct of a third party to prevent harm to others. Calwell v. Hassan, 260 Kan. 769, 778, 925 P.2d 422 (1996). A special relationship may exist, however, with persons in charge of one with dangerous propensities or persons with custody of another. C.J.W. v. State, 253 Kan. 1, 8, 853 P.2d 4 (1993). We have not, in any previously reported Kansas case, extended or found a "special relationship" to exist between one conditionally
released from incarceration by mandatory operation of law and the State or its duly authorized employee who is responsible to supervise such individual. We first consider whether we should do so under the facts of this case.

The Restatement (Second) of Torts § 315-20 (1965) sets forth the basic rules regarding liability for the conduct of third persons:

"§ 315 General Principle

"There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection."

Comment c to § 315 provides:

"The relations between the actor and a third person which require the actor to control the third person's conduct are stated in §'s 316-319. The relations

between the actor and the other which require the actor to control the conduct of third persons for the protection of the other are stated in §'s 314A and 320."

Sections 316, 317, and 318 of the Restatement relate to the duty of a parent to control the conduct of a child, the duty of a master to control the conduct of a servant, and the duty of a possessor of land to control the conduct of a licensee, respectively, and none are applicable to our case.

Section 319 of the Restatement reads:

"§ 319. Duty of Those in Charge of Person Having Dangerous Propensities

"One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."

Section 320 of the Restatement requires those taking custody of a person to use reasonable care to control the conduct of third persons so as to prevent them from harming the person in custody. This section does not apply to the facts of the present case, as Stephanie clearly was never in the custody of the KDOC or Schirk.

Section 319 is the only section remotely applicable to our situation. However, we find neither Schirk nor the KDOC had charge of Gideon to the extent necessary to fall within this section. The Comment to the Restatement (Second) of Torts § 319 states:

"Comment:

"a. The rule stated in this Section applies to two situations. The first situation is one in which the actor has charge of one or more of a class of persons to whom the tendency to act injuriously is normal. The second situation is one in which the actor has charge of a third person who does not belong to such a class but who has a peculiar tendency so to act of which the actor from personal experience or otherwise knows or should know.

"Illustrations:

"1. A operates a private hospital for contagious diseases. Through the negligence of the medical staff, B, who is suffering from scarlet fever, is permitted to leave the hospital with the assurance that he is entirely recovered, although his disease is still in an infectious stage. Through the negligence of a guard employee by A, C, a delirious smallpox patient, is permitted to escape. B and C communicate the scarlet fever and smallpox to D and E respectively. A is subject to liability to D and E.

"2. A operates a private sanitarium for the insane. Through the negligence of the guards employed by A, B, a homicidal maniac, is permitted to escape. B attacks and causes harm to C. A is subject to liability to C."

In refusing to grant summary judgment, the trial court primarily relied on two cases from other jurisdictions, Division of Corrections v. Neakok, 721 P.2d 1121 (Alaska 1986), and Rieser v. District of Columbia, 563 F.2d 462 (D.C.Cir.1977), to support the belief that a special relationship exists between a parole officer and a parolee so that a duty is owed to protect third persons. We first determine if the trial court correctly concluded Schirk was "in charge of" Gideon to the extent necessary to form a § 319 special relationship and, if it did, whether the duty to protect third parties extends to and includes

a duty to warn either the public at large or a limited class of persons having a current or previous involvement with the parolee.

We utilized § 319 in Kansas in Cansler v. State, 234 Kan. 554, 675 P.2d 57 (1984), where we found that the Kansas State Penitentiary owed a duty to warn local law enforcement officers of the escape of armed and dangerous prisoners who had been in the charge of the penitentiary. This was a prison escape case, and we had no problem holding the State was in charge of seven prison escapees, all of whom were alleged to have been serving life terms after convictions for murders in various degrees. This is a far cry from imposing like obligations on the State as to every prisoner released from incarceration under parole or conditionally released by mandatory operation of law after serving a sentence less good time credits.

Beck v. Kansas Adult Authority, 241 Kan. 13, 735 P.2d 222 (1987), a negligence case involving a person on conditional release who committed multiple murders at the University of Kansas Medical Center, refrained from addressing the question of whether a duty to warn or control existed and rendered judgment against plaintiffs by directly addressing the question of whether the adult authority was entitled to immunity under the KTCA. Thus, the question of whether § 319 applies to those on parole such that a duty exists has not previously been directly addressed in this state.

The Alaska court in Neakok, 721 P.2d at 1126, relied upon by the trial court, determined that a parole officer maintained sufficient control over a parolee to create a special relationship such that a duty was owed by the State, "both because of its increased ability to foresee the dangers the parolee poses and because of its substantial ability to control the parolee." The Alaska

court compared the relationship to that in Tarasoff v. Regents of University of California, 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334 (1976) (psychotherapist and patient); and Semler v. Psychiatric Institute of Washington, D.C., 538 F.2d 121 (4th Cir.), cert. denied 429 U.S. 827, 97 S.Ct. 83, 50 L.Ed.2d 90 (1976) (state hospital and patient), and held the relationship between the State and a parolee was comparable to justify imposition of a duty to control his or her conduct. Neakok is factually different in that it involved the return of a parolee to a remote village without police officers or alcoholic counseling. It is not
sufficient authority for the result reached by the trial court in the present case.

Although Rieser, 563 F.2d 462, did involve a parole officer and his parolee, the opinion did not comment on the application of the "special relationship" required in order for§319 to apply. The Rieser court found that a parole officer owed a duty to warn potential employers of a parolee's criminal history and to place controls upon the type of work he or she could engage in. The parole officer in Rieser assisted a convicted rapist in obtaining employment as a maintenance worker at an apartment complex. Rieser was subsequently raped and strangled by the parolee, who had access to her apartment. On a referral form, the officer listed only that the parolee had been convicted of robbery, failed to mention that he was a suspect in three murders which had occurred at the apartment community he had previously worked at, and placed no restrictions upon the type of work appropriate to him. Due to these distinguishable facts, Rieser is not persuasive authority in this instance.

The most helpful case to the Schmidts' arguments as to the existence of a "special relationship" under § 319 is Taggart v. State, 118 Wash.2d 195, 223, 822 P.2d 243

(1992), where it was held that "a parole officer takes charge of the parolees he or she supervises despite the lack of a custodial or continuous relationship." While this had the effect of imposing liability under § 319, we reject this overbroad construction which escalates the State's responsibility to that of the virtual guarantor of the safety of each and every one of its citizens from illegal and unlawful actions of every parolee or person released from custody under any type or kind of supervision.

The better-reasoned and more logical approach is that taken in Fox v. Custis, 236 Va. 69, 75, 372 S.E.2d 373 (Va.1988), which held that state parole officers did not take charge or exercise control over a parolee within the meaning of § 319, giving rise to any "special relationship." The Virginia Supreme Court held:

"The relationship between the parolee and officer is usually continuing because parole normally is for an extended period of time.

But to 'supervise and assist' during this period does not mean to assert custody in the sense that the parolee is in the personal care and control of the officer. While the record does not show the terms and conditions of Mason's parole, parolees ordinarily are essentially free to conduct their day-to-day affairs, adhering to specific rules and reporting certain activities to the parole officer as they occur or are planned. The applicable statute does not contemplate continuing hourly or daily dominance and dominion by a parole officer over the activities of a parolee.

"Therefore we hold that the defendants did not take charge of or exercise control over Mason within the meaning of accepted rules of tort law articulated in Restatement §'s 315(a) and 319." 236 Va. at 75, 372 S.E.2d 373.

This same logic and rule has been utilized by

several other states. See Small v. McKennan Hosp., 403 N.W.2d 410 (S.D.1987) (parole officer for parolee placed on maximum supervision status did not take charge of parolee so as to impose liability upon officer when parolee abducted woman from parking lot and raped and murdered her); Lamb v. Hopkins, 303 Md. 236, 492 A.2d 1297 (1985) (probation officer did not take charge of probationer so as to establish duty to parents of child injured in auto accident by intoxicated probationer who had known propensities to drive while drunk); see also Seibel v. City and County of Honolulu, 61 Haw. 253, 602 P.2d 532 (1979).

In Calwell v. Hassan, 260 Kan. at 780, 925 P.2d 422, we recognized that we have only imposed a duty to control the conduct of third persons pursuant to§315 in situations involving dangerous persons in a custodial setting. Furthermore, we have previously rejected application of the theory to create a duty on the part of a psychiatrist to control a patient or warn others of his or her dangerous propensities, finding no special relationship, in Boulanger v. Pol, 258 Kan. 289, 900 P.2d 823 (1995).

We hold no special relationship existed between the State defendants and Schirk and Gideon which imposed a duty to control Gideon's conduct to prevent him from causing harm to other persons or property.

However, even if we decided that a special relationship was present between a parole officer and parolee and adopted the reasoning of Taggart, 118 Wash.2d at 258, 821 P.2d 1216, or of Neakok, 721 P.2d at 1128-29, we would still need to address whether the duty to control extends to a duty to warn potential victims.

Neakok relied on California decisions in concluding that a parole officer owed a duty to warn the members of the small community where the parolee

resided of his dangerous tendencies. Cases from California, however, have found no duty to warn in a situation much more egregious than the one in the present case. In Thompson v. County of Alameda, 27 Cal.3d 741, 167 Cal.Rptr. 70, 614 P.2d 728 (1980), the California Supreme Court determined there was no relationship between a county which had granted an 18-year-old juvenile temporary leave into his mother's custody and the murdered victim of the juvenile. The court held there was no duty to warn the local police, the neighborhood parents, or the juvenile's mother that the juvenile had indicated that if released, he would take the life of a young child residing in the neighborhood.

The court noted several factors it considered when deciding whether a duty should be imposed, including "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." [Citations omitted.] When public agencies are involved, additional elements include 'the extent of [the agency's] powers, the role imposed upon it by law and the limitations imposed upon it by budget.' [Citations omitted.]" Thompson, 27 Cal.3d at 750, 167 Cal.Rptr. 70, 614 P.2d 728.

The Thompson court distinguished prior cases where it had imposed a duty to warn, Johnson v. State, 69 Cal.2d 782, 73 Cal.Rptr. 240, 447 P.2d 352 (1968), and Tarasoff, 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334, on the ground that in each of those cases, a relationship

existed between the State and the plaintiff-victim, not because of the relationship between the State and the third party. In Thompson, as in the present case, there was no special relationship between the State and the victim, and the court refused to impose blanket liability on the State for failing to warn. The court stated that parole and probation release is an integral and continuing part of its correctional system, serving the public by rehabilitating offenders and returning them to productive positions in society, such that " 'each member of the general public who chances to come into contact with a parolee bear[s] the risk that the rehabilitative effort will fail.' " Thompson, 27 Cal.3d at 753, 167 Cal.Rptr. 70, 614 P.2d 728.

Despite the fact there was an actual threat of harm in Thompson, the court believed there were significant practical obstacles in the imposition of a duty to warn, particularly recognizing that such a warning "may also negate the rehabilitative purposes of the parole and probation system by stigmatizing the released offender in the public's eye," 27 Cal.3d at 755, 167 Cal.Rptr. 70, 614 P.2d 728, and "might substantially jeopardize rehabilitative efforts both by stigmatizing released offenders and by inhibiting their release." 27 Cal.3d at 757, 167 Cal.Rptr. 70, 614 P.2d 728. The court believed that even warning the parents of young children in the neighborhood would be a significant drain on resources and would not likely have been any more effective.

Another California case refused to impose a duty to warn in circumstances somewhat similar to the present case. In J.A. Meyers & Co. v. Los Angeles County Probation Dept., 78 Cal.App.3d 309, 144 Cal.Rptr. 186 (1978), the court found no duty to warn a probationer's employer that the probationer was a convicted embezzler. Noting that the defendants did nothing to help the

probationer acquire the job, the court found no relationship existed such that the probation department should have revealed the probationer's status and risked ruining the rehabilitative effort.

It is important to remember that the present case does not involve a situation where any specific threat of harm had been directed against any certain individual or ascertainable group. See, e.g., Rogers v. Dept. Of Parole & Comm. Corr., 320 S.C. 253, 464 S.E.2d 330 (S.C.1995).

In Kansas, we have addressed a duty to warn in only a few cases, all factually distinguishable from the present case. In Cansler, 234 Kan. 554, Syl. p 3, 675 P.2d 57, we recognized a legal duty to warn local law enforcement authorities and area residents of major escapes of dangerous criminals. We did, however, point out that the duty to act reasonably was commensurate with the risk involved.

The situation in Cansler should be compared to that in Jarboe v. Board of Sedgwick County Comm'rs, 262 Kan. 615, 938 P.2d 1293 (1997). Although we refused to decide Jarboe on the ground that no duty was owed because it had not been expressly raised by the parties, we recognized that the case could well have been disposed of on that basis. 262 Kan. at 623, 938 P.2d 1293. In Jarboe, the plaintiffs never alleged that any common-law duties existed to confine the juvenile offender and warn of his escape beyond those they claimed were created by the personnel policies of the defendants. Clearly, the duty found to exist so strongly in Cansler diminished considerably under the factual scenario of Jarboe.

Our appellate courts have also examined whether a duty to warn and protect was owed in several other custodial settings, including C.J.W., 253 Kan. 1, 853 P.2d 4; Cupples v. State, 18 Kan.App.2d 864, 861 P.2d 1360 (1993); and Washington v. State, 17 Kan.App.2d 518, 839

P.2d 555, rev. denied 252 Kan. 1095 (1992). The duty, however, in each of these cases was premised upon Restatement (Second) of Torts § 320, the duty owed to one taken into custody, rather than upon § 319. Further, in Nero v. Kansas State University, 253 Kan. 567, 583, 861 P.2d 768 (1993), the court focused not on a duty owed pursuant to § 319 to control persons with known dangerous propensities, but on the University's relationship as a landlord with its tenants such that it owed a duty to use reasonable care for their protection. Thus, the duty to warn and protect discussed in cases such as these is not applicable to the present situation, where absolutely no special relationship existed between the State and Stephanie.

In the present case, the plaintiffs argue that female employees of Hamilton's were a readily identifiable potential class of victims such that they should have been warned. However, other classes of potential victims could also be identified, such as those living in Gideon's building or neighborhood, women Gideon dated, and regular patrons at bars Gideon frequented.

We further hold that even if a special relationship existed to control the conduct of Gideon, the KDOC and Schirk owed no duty under§315 to warn Stephanie about Gideon's dangerous propensities in the absence of an express threat.

The trial court ruled that even if no special relationship existed such that the State defendants owed a duty to Stephanie to warn her of Gideon's criminal history, the unwritten notification policy created such a duty. The trial court held: "Moreover, as the Court observed in its Finding of Fact, the DOC had adopted an unwritten policy of warning individuals potentially at risk from parolees. After adopting this policy, it then became incumbent upon the DOC to administer this policy in an

effective manner." The court later went on to state: "Moreover, it can be argued that the DOC's adoption of the unwritten warning policy created a duty to those potentially and identifiably at risk. Accordingly, an alleged breach of said duty would certainly mitigate against the discretionary function exception."

In light of recent decisions by this court, this portion of the trial court's ruling is clearly erroneous. Either Schirk and the KDOC owed a duty due to the fact that they had a special relationship with Gideon, or they did not. No personnel policy, particularly not an unwritten one, can create this duty.

In Jarboe, 262 Kan. 615, Syl. p 1, 938 P.2d 1293, we stated that prior case law permitting a duty to be based upon the failure to follow written personnel policies had been superseded by the legislative enactment of K.S.A. 75- 6104(d). Liability can no longer be established by the failure to follow such a policy unless an independent duty of care is owed to the injured party. 262 Kan. 615, Syl. p 1. In Jarboe, the plaintiffs argued that the State defendants owed a duty in light of their failure to follow personnel policies regarding the placement and control of a juvenile offender placed in a boys' home. We found that 75-6104(d) barred imposition of such liability.

Consistent with this result and holding is our recent case of Woodruff v. City of Ottawa, 263 Kan. 557, 556, 951 P.2d 953 (1997), where we also rejected an argument that an unwritten policy had been created such that a police officer owed a duty to protect the plaintiffs from the conduct of a third party.

Clearly the idea that the KDOC's unwritten policy in and of itself created a legal duty on the part of Schirk and the KDOC to protect Stephanie is not viable. The holding of the trial court which so implies is not correct.

Immunity under the KTCA

Having determined that the KDOC and Schirk owed no duty to Stephanie to warn of Gideon's potential dangerousness, we need not base our decision on whether the KTCA provides immunity from the Schmidts' claims. However, we easily find that Schirk's conduct in failing to disclose Gideon's criminal history to his employer falls within the discretionary function exception of K.S.A. 75-6104(e).

Although governmental entities do not have discretion to violate a legal duty, we have not held that the existence of any duty deprives the State of immunity under the discretionary function exception. If such were the case, K.S.A. 75-6104(e) could never apply in a negligence action, for in order to recover for negligence, a plaintiff must establish the existence of a duty. We explicitly rejected such an argument in Jarboe, 262 Kan. at 631, 938 P.2d 1293.

In Beck, 241 Kan. at 30-31, 735 P.2d 222, we extensively discussed the history of the discretionary function exception in Kansas, which need not be reiterated here. In Hopkins v. State, 237 Kan. 601, 610, 702 P.2d 311 (1985), we stated:

"Discretion implies the exercise of discriminating judgment within the bounds of reason. [Citation omitted.] It involves the choice of exercising of the will, of determination made between competing and sometimes conflicting considerations. Discretion imparts that a choice of action is determined, and action should be taken with reason and good conscience in the interest of protecting the rights of all parties and serving the ends of justice."

In both Cansler, 234 Kan. 554, 675 P.2d 57, and C.J.W., 253 Kan. 1, 853 P.2d 4, we held that the duty to confine prisoners or control their behavior and the duty

to warn others about their dangerous propensities were nondiscretionary. Those duties were imposed by law and were ministerial. We also held in Allen v. Kansas Dept. of S.R.S., 240 Kan. 620, 731 P.2d 314 (1987), that the negligent performance of a ministerial act is not within the discretionary function exception, even if the decision to perform the act is.

However, we recently decided in Woodruff, 263 Kan. 557, 951 P.2d 953, that the decision whether to take an intoxicated individual into custody is discretionary and entitled to immunity. In Bolyard, 259 Kan. 447, 912 P.2d 729 (1996), we ruled that SRS's decision to temporarily place children with their mother was entitled to immunity under the discretionary function exception. In G. v. State Dept. of SRS, 251 Kan. 179, 833 P.2d 979 (1992), we held the removal of a child from a foster care home by SRS was within the discretionary function exception.

In Beebe v. Fraktman, 22 Kan.App.2d 493, 921 P.2d 216, cert. denied 136 L.Ed.2d 715 (1996), the Court of Appeals held that the decision whether to open a file for investigation of allegations of child abuse is a discretionary function. That court also held in Burney v. Kansas Dept. of SRS, 23 Kan.App.2d 394, 931 P.2d 26 (1997), that the manner of conducting an investigation into a charge of child abuse is a discretionary function.

In Jarboe, 262 Kan. 615, 938 P.2d 1293, we discussed how the placement decision regarding a juvenile offender was exactly the type of discretionary decision that the KTCA was intended to protect. We further quoted from Beck, 241 Kan. at 36-37, 735 P.2d 222:

"We do not believe that the legislature, in enacting the Kansas Tort Claims Act, intended to subject parole or probation decisions of the authorities, whether the Kansas Adult Authority or the sentencing judge, to litigation in order to determine whether the Authority or judge turned

every tap and jumped through every hoop in arriving at a decision to place an inmate on parole or to impose conditions on a conditional release. It is these discretionary functions of state agencies or employees which the legislature intended to place beyond the pale of tort litigation.

"The possibility of harm to third persons exists every time a prisoner convicted of violent crime is released from custody and placed back into society, yet the time always arrives when release must be effected. A decision as to the imposition of conditions, if any, must be made. Such a decision involves the exercise of great discretion. Boan had to be released, under state law. Whether conditions might have been imposed which would have prevented this catastrophe is an open question. Hindsight, always better than foresight, indicates some conditions might have had some effect. But such a decision, made now, would merely second-guess the parole authority, the agency in whose hands the legislature entrusted the discretion."

In the present case, the discretionary function exception likewise applies. No duty was imposed by law upon Schirk to notify the Employers of his parolees of their criminal history, even had we found a special relationship existed between Schirk and Gideon.

Furthermore, in deciding whether to inform Hamilton of Gideon's criminal history, Schirk was required to balance society's interest in rehabilitating Gideon by ensuring he remained employed with the potential danger to third persons that he would reoffend. He had to weigh various risk factors, including Gideon's past and present conduct, in determining the danger posed to others. Schirk had no knowledge of any particularized threat to any of Gideon's co- workers, and as time passed, Schirk may have been less likely to believe

there was a danger to such persons.

The Schmidts emphasize that Schirk admitted he was aware that Gideon's female co-workers were at high risk of danger, but still failed to notify Hamilton of Gideon's criminal history pursuant to the KDOC's third-party-at- risk policy. However, Schirk clearly stated that he did not believe the waitresses to be at such risk that they required notification under the policy. This decision is exactly the type which requires discretion, even if under current law or policy such discretion has been removed and employers are now required to be notified.

In light of what we have previously stated, we need not discuss utilization of the exception of K.S.A. 75-6104(d) to dispose of the Schmidts' claims against Schirk and the KDOC, nor do we need to consider whether the police protection exception of 75-6104(n) also applies to bar the Schmidts' claims.

The trial court's denial of summary judgment in favor of the KDOC and Schirk is reversed.

Duty--Hamilton defendants

The Hamilton defendants argue the trial court erred in concluding they owed a continuing duty to Stephanie which still existed at the time of her death, after she had ceased working at their business of her own volition. They emphasize that Gideon caused Stephanie's injuries and death during a time in which he was not providing any services for Hamilton's, at a Place completely removed from its premises, and with absolutely no nexus to the business. They claim the logical effect of the trial court's
conclusion, if allowed to become the law of Kansas, "would essentially hold an employer liable to any former employee or customer for the conduct of an employee

without regard to the relationship among the parties, the passage of time, the location, or any nexus to the employer's business."

Hamilton's further cites our recent case of Beshears v. U.S.D. No. 305, 261 Kan. 555, 930 P.2d 1376 (1997), to argue there exists no special relationship upon which a duty to control Gideon's conduct may be based. Hamilton's contends the tragic events of this case were not foreseeable as a matter of law and asks us not to accept the broad and all encompassing "but for" argument that is contrary to our accepted principles of causation.

The Schmidts do not contend the Hamilton defendants are liable under the respondeat superior doctrine, but rather that Hamilton's negligence lies in hiring and retaining Gideon, whom Hamilton's should have known had dangerous propensities. They further contend it is a jury question whether the negligent hiring and retention of Gideon was the proximate cause of the attack upon Stephanie.

The Schmidts rely in part on the Missouri case of Gaines v. Monsanto Co., 655 S.W.2d 568 (Mo.App.1983), and a string of Kansas cases dealing with the issue of negligent hiring and retention of unfit or incompetent employees.

In reaching its decision, the trial court relied on the fact that Kansas has long recognized a claim premised upon the negligent hiring and retention of an employee. Further, the court noted that employers are required to provide suitable and competent fellow servants, citing Jackson v. City of Kansas City, 235 Kan. 278, 304, 680 P.2d 877 (1984). The trial court distinguished this duty both from respondeat superior liability and from the duty to control the conduct of third parties set forth in the Restatement (Second) of Torts § 315, discussed in the

claims against the KDOC and Schirk. The court held that the duty was abrogated when Hamilton negligently hired and continued to retain Gideon as an employee; thus, it did not matter that the injuries occurred after Stephanie was no longer an employee, at a time not during business hours, and at a place completely apart from the business premises.

The trial court found the factual situation to be similar to Gaines, where the plaintiffs claimed the defendant employer had been negligent in hiring and retaining an employee with dangerous proclivities who had murdered their daughter in her apartment. The employee was placed in a position where he would come into contact with female employees and learn their names and addresses.

The Gaines opinion stated it was mindful of the adverse effect that recognizing such a cause of action would have on employment practices, but broadly held that matters of foreseeability and proximate cause were jury questions. The court held: "Generally it is sufficient to constitute proximate cause that the negligence charged was the efficient cause which set in motion the chain of circumstances leading up to the injury." 655 S.W.2d at 571.

In Gaines, the Missouri Court of Appeals did recognize in a footnote that "plaintiffs would not make a prima facie case of liability solely by proving that the employer actually knew of the employee's criminal record. Liability would depend, among other things, on the nature of the criminal record and the surrounding circumstances. See Evans v. Morsell, 395 A.2d at 484." 655 S.W.2d at 571 n. 2. Additionally, another Missouri Court of Appeals panel distinguished Gaines in Hollingsworth v. Quick, 770 S.W.2d 291, 294 (Mo.App.1989), where it was said:

"[B]ut in that case the plaintiff alleged not only that the employee had convictions for rape and assault, but the employer knew the employee had made improper and offensive advances toward fellow employees and yet did nothing when in possession of actual knowledge that retention of the employee created a potential hazard to those with whom he came in contact."

The present case is also distinguishable from Gaines in that here, Gideon had been described as a very polite, dependable, soft-spoken, likeable, and trustworthy employee. Hamilton's also knew of no improper or offensive behavior directed at fellow employees.

The specific finding of the trial court in the present case was that a duty existed at the time Stephanie was employed at Hamilton's to hire and retain suitable co-employees. The trial court held that whether the duty was breached and whether any alleged breach resulted in a foreseeable murder was a question for the jury.

The trial court looked to Honeycutt v. City of Wichita, 251 Kan. 451, Syl. p 8, 836 P.2d 1128 (1992), where we said:

"In a negligence action, summary judgment is proper if the only questions presented are questions of law. To recover for negligence, the plaintiff must prove the existence of a duty, breach of that duty, injury, and a causal connection between the duty breached and the injury suffered. Whether a duty exists is a question of law. Whether the duty has been breached is a question of fact."

The Schmidts do not contend that a "special relationship" exists as we have previously discussed herein in relation to the claims made against the State. They are not asserting that Hamilton's had a duty to control Gideon to prevent harm to Stephanie. Rather, their contention is that Hamilton's had a duty not to negligently

hire and retain Gideon and that this duty was breached, thereby causing their injuries.

We have, in Kansas, broadly stated that

"a master may be liable for injuries to a third person which are the result of the incompetence or unfitness of his servant where the master was negligent in employing the servant or in retaining him in employment when the master knew or should have known of such incompetence or unfitness of the servant." Balin v. Lysle Rishel Post No. 68, 177 Kan. 520, Syl. p 4, 280 P.2d 623 (1955).

This statement, however, specifically relates to incompetence or unfitness, and the underlying facts of the string of cases where it has been stated relate mainly to acts occurring at the employer's business location or during the conduct of the employer's business.

Balin involved injuries to a hotel employee who was damaged by the negligent discharge of a firearm by another hotel employee who had a prison record, worked on firearms on the premises, and at times engaged in "horseplay" around the lobby. Although cases were referred to relating to a master's negligence in maintaining a servant's employment, the evidence was held not to show that the servant was incompetent or unfit, and the master was not liable in damages to one servant for injuries inflicted on him by the act of a fellow servant. Viewed factually and focusing on the result, Balin provides no persuasive authority for the Schmidts' arguments in our case.

Murray v. Modoc State Bank, 181 Kan. 642, 313 P.2d 304 (1957), involved a suit against a bank by a customer who was assaulted by the bank's employee, Breithaupt. Murray had a bad relationship with Breithaupt and attempted to transact his business by mail. Breithaupt went to Murray's home and demanded that

checks be deposited as he directed and that a property settlement be furnished.
When Murray declined, Breithaupt pulled him off his porch, punched him, threw him to the ground, and inflicted injuries on him.

In allowing recovery under these circumstances, the opinion spoke of protecting a patron invitee and stated: "The patron was as much within the portals of the bank as if he stood before the cashier's window." 181 Kan. at 649, 313 P.2d 304. The doctrine of respondeat superior was not involved, and the issue was whether the bank was negligent in retaining Breithaupt, who had propensities toward violence. Cases were cited where employees had assaulted other parties or co-workers and these facts were known to the employer. See Zamora v. Wilson & Co., 129 Kan. 285, 282 Pac. 719 (1929) (finding no claim for tortious act against fellow employee where act not done in the promotion of the master's business or as a part of the employee's duties); Gabbard v. Sharp, 167 Kan. 354, 205 P.2d 960 (1955) (holding waitress not allowed to recover for assault by intoxicated fellow employee because the employee had stepped beyond the scope of his employment and was engaged in a personal venture of his own, although waitress also filed no brief and did not support her case on appeal).

The Murray opinion also cited Kiser v. Shelly Oil Co., 136 Kan. 812, 814, 18 P.2d 181 (1933), where a jury found an employer negligent "by maintaining incompetent help and insufficient door equipment." A door had been slammed by an employee against a customer at a filling station, breaking the glass and injuring the customer. In concluding that a cause of action was alleged against the Modoc State Bank on a negligence theory, this court held that an employee "who is a quarrelsome and dangerous person is an 'unfit' person within the meaning of that

term." 181 Kan. at 654, 313 P.2d 304.

Once again, Murray was a case where the location and time of the assault played a part in holding the employer liable. In the present case, Gideon's conduct while at Hamilton's was generally positive, and there existed no evidence of quarrelsome or dangerous behavior directed at fellow employees or customers. Another case in the sequence is Stricklin v. Parsons Stockyard Co., 192 Kan. 360, 388 P.2d 824 (1964), where liability attached to acts committed on the employer's premises during business hours where an employee was given to playing pranks involving physical force upon customers. The employee had lifted Stricklin's feet while he was seated on the top of a cattle pen, causing him to fall on a concrete floor and resulting in injury.

Stricklin was not an intentional infliction of injuries case, and while the doctrine of respondeat superior was not involved, it was alleged the employers knew or had reason to know both of the employee's propensities for over 1 year, and of eight separate acts of "horseplay" involving physical force upon persons lawfully in and around the stockyards. Our opinion held: "[G]iving the allegations all reasonable inferences, we think it must be said that [the employee] was an incompetent and unfit employee retained by [the employers] after they knew or had reason to know of his propensities." 192 Kan. at 367, 388 P.2d 824.

In Stricklin we again have a fact situation where the conduct of the employee giving rise to the alleged negligent act occurred on the business premises during business hours and involved numerous acts of improper behavior well known to the employers. This is factually very different from the facts we face in our case.

Next in the chronological order of our Kansas cases is Hollinger v. Stormont Hosp. & Training School for

Nurses, 2 Kan.App.2d 302, 307, 578 P.2d 1121, rev. denied 225 Kan. 844 (1978). Here, the Court of Appeals limited the broad statements from Stricklin and Murray and approved the following instruction:

"[T]here must be some causal relationship between the dangerous propensity or quality of the employee, of which the employer has or should have knowledge, and the injuries suffered by the third person; the employer must, by virtue of knowledge of his employee's particular quality or propensity, have reason to believe that an undue risk of harm exists to others as a result of the continued employment of that employee; and the harm which results must be within the risk created by the known propensity for the employer to be liable."

In Hollinger, the plaintiff was selling and delivering newspapers to patients and employees in the hospital when a janitor, claiming to be playing a practical joke, approached her from behind and attempted to remove a newspaper from her bag, jerking it in such a manner that she was injured. The instruction referred to above was coupled with one that stated that in order for plaintiff to recover, she must prove the employee was incompetent or unfit and that the defendant was negligent in employing and retaining the employee when the defendant knew or should have known of such incompetence or unfitness. While two causes of action were maintained, one under the doctrine of respondeat superior and one for failing to exercise reasonable care in the selection, employment, training, control, and retention of an employee, this case was deemed fundamentally different from Balin, Murray, and Stricklin, as follows:

"In Stricklin, the employer had or should have had knowledge of its employee's dangerous inclination toward pranks and practical jokes. In Murray, the bank had knowledge of its managing officer's violent dislike for

plaintiff and his inability to control his emotions. In this case, defendant had knowledge that Rome was not doing his work properly, had displayed a lack of interest in his job, and that the haphazard way in which he did work and left his equipment around was dangerous to patients and other employees.

The resulting situation is nearer that in Balin since there as here defendant had little or no knowledge of its employee's propensity for dangerous 'horseplay.' " 2 Kan.App.2d at 306-07, 578 P.2d 1121.

Although the Hollinger case was submitted to a jury and resulted in a verdict for the defendant, the injury did occur, once again, on the employer's premises during normal hours and was caused by an employee whose work was unsatisfactory.

Plains Resources, Inc. v. Gable, 235 Kan. 580, 586, 682 P.2d 653 (1984), is a factually interesting case of a "big, wild, reckless, rough, unkept" employee who sabotaged one of plaintiff's oil wells by plugging the well. Both the theories of respondeat superior and negligent hiring and retention of an incompetent or unfit employee were discussed as the basis for imposing liability on the employer as well as for awarding punitive damages. However, the actions here again took place at the place of employment, were directly associated with the employer's business, and did not occur at a social event totally removed from the employer's business or purposes.

*22 Finally, we have our most recent decision of Kansas State Bank & Tr. Co. v. Specialized Transportation Services, Inc., 249 Kan. 348, 819 P.2d 587 (1991), which involved the sexual molestation of a special education child by an employee retained by a school district to transport students enrolled in the program. Syllabus p 1 broadly states:

"When a third party asserts a negligent retention and supervision claim against an employer, liability results not because of the employer-employee relationship, but because the employer had reason to believe that an undue risk of harm to others would exist as a result of the employment of the alleged tortfeasor. The employer is subject to liability only for such harm as is within that risk. If, therefore, the risk exists because of the quality of the employee, there is liability only to the extent that the employer had reason to believe would be likely to cause harm. However, it is not necessary that the precise nature of the injury alleged by the third-party plaintiff would have been foreseen by the employer."

There were six separate issues in this complicated case, but of interest here was the sufficiency of the evidence to prove that the school district and the employer knew or should have known that an undue risk of harm would exist because of the employee's employment. The instructions were much like those approved of in the Hollinger case, but carried a heightened duty in stating that "all persons entrusted with children have a special responsibility to supervise their charges."

The cause of action was again based on the actions of an employee engaged in his employment and at the normal place where his employment services were rendered. When viewed in its entirety, the case does not provide a sufficient basis for us to impose upon an employer the obligation to be legally liable and responsible for the illegal acts of employees which occur at social settings away from the place of employment or to former co-workers who no longer remain in the employ of the employer. Such a result has the legal effect of making an employer the virtual insurer of the safety of former co-workers for any tortious or criminal action

which an existing or even former employee may perpetrate.

In each of the Kansas cases upon which liability of the employer was predicated, the existence of a duty to the injured party was based on actions against a customer or co-worker which took place on the working premises during the time employment services were normally rendered. In none of such cases was the employee not acting in the course of employment, nor was the injurious action removed from the employer's premises or without any nexus to the employer's operations.

None of the Kansas cases cited should be unduly extended to find that a duty comes into existence whereby an employer must ascertain the detailed history of every employee, whether criminal or not, and terminate the employment of an individual who is performing acceptable services and is clearly not unfit or incompetent, but who does pose some degree of risk due to previous actions. This case involves a tragic set of circumstances, but if a duty is found to exist here, as a matter of law, the liability of employers is unrealistically increased and the obligations of an employer become virtually unlimited.

What we have previously said severely limits our reliance on the authority of the Missouri Court of Appeals' opinion in Gaines, 655 S.W.2d 568, and we specifically decline to follow it as the law of Kansas. It is factually different and unduly broad in its scope and statements.

Cases can be found from other jurisdictions to support the arguments of both the Hamilton defendants and the Schmidts. While we will not attempt to compare or distinguish such cases, we believe the better reasoned view is found in cases such as Connes v. Molalla Transport System, Inc., 831 P.2d 1316 (Colo.1992) (recognizing an action for negligent hiring, but finding

employer had no legal duty to conduct independent investigation into trucker's nonvehicular criminal background in order to protect a member of the public from a sexual assault committed in the course of employment), and F & T Co. v. Woods, 92 N.M. 697, 594 P.2d 745 (1979) (holding that in negligence action brought by rape victim against employer of alleged rapist, it was not enough that victim prove that employer was negligent in hiring or retaining alleged rapist; in addition, victim had to prove that negligent hiring or retention of alleged rapist was foreseeable and proximate cause of the rape). See generally Annot., Employer's Knowledge of Employee's Past Criminal Record as Affecting Liability for Employee's Tortious Conduct, 48 A.L.R.3d 359 and supplement thereto.

The trial court erred in finding that a duty existed on the part of the Hamilton defendants to Stephanie upon which a cause of action could be premised.

Due to the result we reach, we need not discuss the questions of proximate cause or foreseeability.

The trial court's granting of summary judgment to the KDOC and Schirk on the 42 U.S.C. § 1983 claim is affirmed. The trial court's denial of the remaining summary judgment motions of all of the defendants is reversed.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 98-382

In The

Supreme Court of the United States

October Term 1997

GENE SCHMIDT and PEGGY SCHMIDT, the heirs of Decedent STEPHANIE SCHMIDT and GENE SCHMIDT, the special administrator of her Estate, on behalf of STEPHANIE SCHMIDT,

Petitioners,

v.

HTG, INC., THOMAS E. HAMILTON, the STATE OF KANSAS, KANSAS DEPARTMENT OF CORRECTIONS, and ROBERT SCHIRK,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kansas

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX B

SCHMIDT, et al.,
Appellees/Cross-appellants,
v.
HTG, INC., et al.,
Appellants/Cross-appellees.
Nos. 79039, 79,040.
District Court of Crawford County, Kansas
December 5, 1996
Syllabus of the Court

MEMORANDUM DECISION

The above-entitled matter is before the Court for resolution of summary judgment motions fled herein by the defendants. The summary judgment motions filed by the Kansas Department of Corrections and Robert Schirk (State Defendants), and by HTG, Inc., and Thomas E. Hamilton (Hamilton) will be addressed separately. This will develop one series of Findings of Fact, which will uniformly apply to the motions filed on behalf of both sets of defendants.

BACKGROUND

This matter arises out of the tragic murder of Stephanie Schmidt on or about July 1, 1993. At the time of her death, Ms. Schmidt was a student at Pittsburg State University in Pittsburg, Kansas. The perpetrator of Ms. Schmidt's murder, Donald Ray

Gideon, was eventually apprehended, convicted, and sentenced to a lengthy prison sentence.

The plaintiffs in the instant case are the natural parents and sister of the decedent. At oral argument on the summary judgment motions, counsel for plaintiffs acknowledged that the decedent's sister, Jennifer Schmidt, cannot bring suit on a state claim. Plaintiffs' counsel does allege, however, that siblings can appropriately pursue a claim pursuant to 42 U.S.C. Sec. 1983.

Plaintiffs' counsel further acknowledges that Sec. 1983 claims cannot presently be pursued against the state defendants in an official capacity.

FINDINGS OF FACT

1. Donald Ray Gideon was conditionally released from prison by mandatory operation of law on November 5, 1992. Gideon had served his maximum sentence as required by law less "good time" credits. Gideon had served an approximate ten (10) year prison sentence resulting from a previous conviction for sodomy and rape. Upon his release from prison, Gideon was placed on parole, which was supervised by defendant Schirk.

2. Defendant Schirk completed a Risk and Needs Assessment upon Gideon to determine the level of supervision required by Gideon. Gideon was assessed as a "high risk" when he was first released from incarceration and placed under the supervision of defendant Schirk. Further, it is the policy of defendant Department of Corrections (DOC) to classify all sex offenders as high risk.

3. On the day he was released from prison,

Gideon signed a Conditional Release Certificate which imposed certain conditions of release as a requirement of parole. Defendant Schirk reviewed these conditions with Gideon. Defendant Schirk also referred Gideon to a mental health therapist and ordered that Gideon obtain employment. Defendant Schirk, as Gideon's parole officer, possessed the inherent authority to impose additional conditions as circumstances warranted.

4. Gideon initially obtained employment at Superior Industries, but quit his job soon after. Gideon then obtained employment at Hamilton's Restaurant in December of 1992. Gideon was not referred to Hamilton's for potential employment by defendant Schirk. Nor did Schirk ever give any representative of Hamilton's any means of reference or recommendation on behalf of Gideon. Gideon's employment at Hamilton's was obtained without involvement from defendant Schirk.

5. "Hamilton's" was a small restaurant located in Pittsburg, Kansas. It opened for business in December of 1992. Defendant Thomas E. Hamilton, in the Fall of 1992, had agreed to manage a restaurant which was to be financed by two other individuals. Defendant, Hamilton, and two other individuals eventually formed HTG, Inc., which then became the parent company of "Hamilton's".

6. Defendant Hamilton did all the hiring and firing for the restaurant. Defendant Hamilton has extensive experience in the food service industry and has hired approximately 1,000 employees in his career. Defendant Hamilton never ran a "records check" on any potential employee to ascertain the presence of prior criminal convictions nor has he ever fired, or was told to

fire, anybody for falsifying an employment application.

7. Defendant Hamilton hired Gideon to work at Hamilton's without any sort of background check. Gideon was initially hired on a part-time basis, however, his hours were later increased to essential full-time. Gideon was employed at Hamilton's from December of 1992 until very early July of 1993.

8. Defendant Hamilton also hired Stephanie Schmidt (victim) to work at Hamilton's. The victim was a student at Pittsburg State University at the time. the victim was hired in December of 1992 and worked at the restaurant until mid-June of 1993, at which time her employment was terminated by reason of a dispute resulting from her handling of a customer order. The victim left work that day and did not return. She was eventually replaced. The victim was not employed at Hamilton's at the time of her tragic murder on or around July 1, 1993.

9. At the time he was initially hired, Gideon did not inform defendant Hamilton of his prior incarceration and the fact that Gideon was at that time on parole. Hamilton remained unaware of Gideon's history and status until February of 1993. At that time Gideon finally admitted his prior incarceration to Hamilton, however, even then Gideon did not admit tot the prior rape conviction, but rather Gideon told Hamilton that the incarceration resulted from a bar fight in which Gideon severely beat an individually with an ax handle and broke the individual's legs in so doing. This information eventually became known by Gideon's co-employees, including the victim.

10. Defendant Hamilton, after Gideon's admission concerning the his prior incarceration, became aware that Gideon was on parole, had a parole officer,

and was counseling with a mental health therapist. Hamilton assumed the counseling was a requirement of Gideon's parole. Hamilton had a chance meeting with Schirk at a convenience store in May or June of 1993. Hamilton did not inquire of Schirk concerning Gideon's crime of conviction, nor did Schirk volunteer any information. When asked by Schirk, Hamilton responded by Gideon was doing fine. This chance meeting was the only contact that ever occurred between Schirk and Hamilton.

11. Defendant Hamilton never attempted to verify in any manner the information that was self-reported by Gideon in February of 1993.

12. Hamilton never received any complaints from his employees concerning Gideon's conduct towards them. Gideon was polite, dependable, and soft-spoken while at work. The waitresses liked Gideon.

13. The victim advised her father (Plaintiff Gene Schmidt) that Gideon was nice to her, that he did not try to hit on her for a date, that she trusted him, and that Gideon assisted the waitresses in protecting their tips.

14. Hamilton likewise trusted Gideon and would occasionally allow Gideon to transport Hamilton's fiancee and daughter to work.

15. On one occasion Gideon told Hamilton that Gideon had slapped a woman for insulting him and had thrown her purse down the stairs. On another occasion Gideon reported to Hamilton that Gideon had told a woman that she would have to leave his apartment unless she had oral sex with him. Hamilton advised Gideon that this was inappropriate conduct. Hamilton, on another occasion, gave Gideon a day off work due to a fight Gideon had been involved in at a local tavern.

16. As of November 1992, Schirk had been a parole officer with the Department of Corrections approximately twelve years. Schirk had supervised paroled sex offenders throughout his career.

17. Schirk never told Hamilton or any of the restaurant employees that Gideon was a paroled sex offender. Schirk did not disclose this information to Hamilton because of concern that Gideon would then be fired. Schirk's goal for Gideon was to assist Gideon in integrating back into society. Schirk believes, pursuant to his training and experience, that society is better protected from recidivism by ensuring that parolees are employed and self-supporting.

18. Hamilton would have told Schirk about Gideon's inappropriate conduct, detailed herein in paragraph #15, had Schirk informed Hamilton of Gideon's full criminal history. Moreover, Hamilton would have informed his employees of this information.

19. Hamilton would not have initially hired Gideon had Hamilton known of Gideon's history.

20. Gideon eventually advised Schirk that Gideon told Hamilton of his parole status. Schirk did not contact Hamilton to determine if the information divulged by Gideon to Hamilton was correct.

21. Schirk acknowledges that it is highly likely that a convicted sex offender will reoffend, accordingly, the conditions and restrictions placed on a paroled sex offender are to be geared towards the protection of the public.

22. While supervised by defendant, Schirk, Gideon did not have any contacts with law enforcement. Gideon reported as directed, maintained employment, participated in mental health counseling, made payments on costs and restitution, and reported spending time in

appropriate pursuits. Schirk was never advised of Gideon's above-referenced inappropriate conduct with women. Schirk believed Gideon was adequately complying with the conditions of parole.

23. Schirk was aware that young women were employed at Hamilton's and that Gideon's prior conviction was for the rape and sodomy of a young woman. Schirk acknowledges that the female employees of Hamilton's restaurant were at a high risk of harm pursuant to their work association with Gideon.

24. By May of 1993, Schirk no longer believed Gideon would lose his employment at Hamilton's if Schirk would have informed Hamilton of Gideon's past criminal history.

25. In 1992 and 1993, the DOC recognized an unwritten policy which required the notification nsf a parolee's pst criminal history to a third-party who was determined to be at risk through association with the parolee. Present DOC policy regarding third-party notification has been reduced to writing and requires employee notification.

26. On the evening of June 30, 1993, the victim and several of her friends went to a bar in Frontenac, Kansas, to celebrate the victim's upcoming birthday. The entourage met Gideon at the bar. The victim later became ill and accepted a ride home from Gideon. The victim and Gideon left together and the victim was never again seen alive. Gideon was later convicted of the victim's rape and homicide.

CONCLUSIONS OF LAW REGARDING HAMILTON MOTION FOR SUMMARY JUDGMENT

Summary Judgement is not appropriate if "the dispute

about a material fact is 'genuine', that is if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 91 L.#d. 2d 202. A material fact is one that outcome controlling. Anderson, supra. If a reasonable fact finder could draw more than one inference from the facts, then a trial court should deny a summary judgment motion. IN considering a summary judgment motion, the trial court must view the evidence in the light most favorable to the non-moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144.

It has been observed that an issue of material fact is not automatically made genuine by the existence of some evidence to support it. Rather, the issue can only be termed "genuine" when there is sufficient evidence to defeat a motion for directed verdict or summary judgment motion. The Anderson Court discussed the standard as follows:

> "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find a preponderance of the evidence that the plaintiff is entitled to a verdict - whether there is [evidence] upon which a jury an properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." Anderson, at 214.

Our Kansas Supreme Court has consistently

provided that the determination of negligence, proximate cause, and foreseeability are questions of fact to be resolved by a jury. Se St. Clair v. Denny, 245 Kan. 414; and, Nero v. Kansas State University, 253 Kan. 567.

Generally, in order to prevail on a claim of negligence, a party plaintiff must provide the following:

1. A relationship between the plaintiff and defendant under which the defendant owes the plaintiff an obligation to use due care;
2. A breach of duty;
3. Damage suffered by the plaintiff, and,
4. A causal connection between the breach and the damage suffered.

Honeycutt v. City of Wichita, 251 Kan. 451, Syl. 8.

The Honeycutt opinion further observes that whether a duty exists is a question of law while whether a duty has been breached is a question of fact. Honeycutt, supra, Syl 8.

The plaintiffs' claim in the instant matter against Hamilton is premised in the negligent hiring and retention of Gideon. This claim has long been recognized in Kansas:

> "A master may be liable for injuries to a third person which are the direct result of the incompetence or unfitness of his servant where the mater was negligent in employing the servant or in retaining him in employment when the master knew or should have known of such incompetence or unfitness of the servant." Hollinger v. Stormont Hospital and Training School for Nurses, 2 Kan. App. 2d 302, Syl. 1;

Bolin v. Lyle Rishel Post No. 68, 177 Kan. 520, Syl. 4; and, Murray v. Modoc State Bank, 181 Kan 642, Syl. 1.

It is important to note at this juncture that the plaintiffs' claim herein is not premised in the doctrine of respondeat superior. Rather, this is an actio pursuant to the common law charging Hamilton with actionable negligence in the hiring and retention of Gideon, who is alleged to have been an incompetent or unfit employee. Accordingly, it is not necessary to determine if Gideon was acting within the scope of his employment at the time he caused the death of Stephanie Schmidt.

The Court is mindful of the four criteria, established in Honeycutt, which must be proven before an action premised in negligence can be successful. These four criteria have been previously listed in this opinion. Of the four listed criteria, it is the first one that controls the determination of this matter. The latter three criteria involve matters to be decided by a jury, however, determining if a relationship exists between the parties which imparts a duty is solely a question of law. Honeycutt, supra.

It is then to the determination of whether a duty exists herein that the Court now turns its attention. Essentially Hamilton argues that no duty was owed to the decedent because she was no longer an employee of Hamilton's. Accordingly, Hamilton alleges that he owed no greater duty to the decedent than is owed to the public at large. Hamilton reasons that it would be a quantum leap to suggest that he owes a duty to a former employee who was murdered by an off-duty employee at another premises in a different city.

Case law clearly provides that an employer owes

a duty to an employee to protect the employee from foreseeable harm. Cansler v. State, 234 Kan. 554. Moreover, an employer is obligated to provide his employees with suitable co-employees. Jackson v. Cit of Kansas City, 235 Kan. 278; and Gaines v. Mnsanto Co., 655 S.W. 2d 568. Hamilton does not necessarily take issue with these precepts, rather, Hamilton argues they do not apply herein because the decedent was no longer an employee of Hamilton's at the time of her death.

The plaintiffs respond to this argument by first noting that it is well recognized that an employer owes a duty to his employee to protect the employee from foreseeable harm. The plaintiff references the following quote from Prosser, Law of Torts, Sec. 46, pp. 348-50, 4th Ed. (1971), as cited in Cansler, supra, at pp. 558-59:

> "The general duty which arises in many relations to take reasonable precautions for the safety of another may include the obligations to exercise control over the conduct of third persons. Thus, the duty of a carrier toward its passengers may require it to maintain order in its trains and stations, and to use reasonable care to prevent not only conduct which is merely negligent, but also personal attacks or thefts of property on the part of other passengers or strangers. A similar obligation rests upon innkeepers toward their guests, upon employers toward their employees, a jailer toward his prisoner, ... and in a large number of cases, it has been extended to owners of premises who hold them open to business visitors...In al

> such cases, the duty is not an absolute one to ensure safety, but requires only reasonable care, an there is no liability where such care has been used, or the defendant either knows or has an reason to know that it is called for" (Emphasis Supplied).

The duty that triggers an obligation to use due care to protect another from harm is created by a relationship between a defendant and the person harmed or the defendant and the third party:

> "It is the general rule that an actor has no duty to control the conduct of a third person to prevent that person from causing harm to others unless a 'special relationship' exists between the actor and the third party or the actor and the injured party." Theis v. Cooper, 243 Kan. 149, 151.

Defendant Hamilton essentially argues that no duty was owed to the decedent at the time of her death because she as a former employee over whom Hamilton had no control or custodial responsibility. Hamilton further alleges that he had no control over Gideon at the time of the murder because Gideon was off duty, no on the premises, and not in the possessio of any instrumentality provided by Hamilton.

The Plaintiffs counter by arguing that Hamilton misconstrues their cause-of-action. The plaintiffs point out that their lawsuit against Hamilton is premised upon Hamilton's negligent hiring and retention of Gideon,

and not upon the doctrine of respondeat superior. The plaintiffs allege that their claims against hamilton are not based on an assertion that Hamilton had a duty to control Gideon, rather, the claims are based upon Hamilton's own independent and allegedly tortious act of hiring and retaining Gideon. Plaintiffs allege that Hamilton's negligent act occurred while the decedent was still an employee of the restaurant - at a time when a duty was owed to the decedent by Hamilton pursuant to the obligation recognized in Jackson and Gaines that an employer hire suitable co-employees. The plaintiffs further allege that it is Hamilton's violation of said duty that set off a sequential chain of events that eventually resulted in the homicide of the decedent. Generally, the plaintiffs argue that "but for" the alleged negligent hiring and retaining of Gideon, the decedent would never have consented to allow Gideon to drive her home on that fateful night.

The main thrust of Hamilton's defense is two fold: 1. Hamilton did not have a duty to control Gideon as the assault occurred off-premises; and, 2. Hamilton owed no duty to the decedent because she was no longer an employee of the restaurant at the time of her homicide. The cases cited by Hamilton in support of his summary judgment motion speak to this two-fold defense and the duty owed by an actor to the harmed party or a third party aggressor.

In response to this two-fold defense, plaintiffs argue that whether Hamilton had a duty to control Gideon is irrelevant because their claims are not premised in an alleged failure to control Gideon. With respect to the second prong, plaintiffs allege that it is not necessary to determine what, if any, duty was owed by Hamilton to the decedent at the time for her death

because the tort of which the plaintiffs complain had already been committed by Hamilton when he hired and retained Gideon. Plaintiffs reason that the torn was allegedly initiated while the decedent was still an employee of the restaurant - at a time when a duty was owed t the decedent. In support of this position, the plaintiffs heavily rely upon Gaines, supra. The Gaines decision is on point. The underlying factual scenario in Gaines is remarkable similar to the instant matter. The employer, Monsanto Company, hired an individual to work as a mail clerk. Subsequently, this individual murdered Kasandra Gaines, who also worked for Monsanto as a secretary. The murder occurred off-premises. The trial court granted Monsanto's summary judgment motion. On appeal, summary judgment was set aside and the case was remanded for trial. The Missouri Court of Appeals observed as follows:

> "We conclude that an employer may be directly liable for negligent hiring or negligent retention of an employee where the employer knew or should have known of the employee's dangerous proclivities and the employer's negligence was the proximate cause of the plaintiff's injury. Negligent hiring or retention liability is independent of respondeat superior liability for negligent acts of an employee acting within the scope of his employment." Gaines, at 570.

The Gaines court further observed:

"Matters of foreseeability and proximate

cause must be left for the court and jury after presented of evidence. Generally, it is sufficient to constitute proximate cause that the negligence charged was the efficient cause which set in motion the chain of circumstances leading up to the injury." Gaines, at 571.

Finally, the Gaines decision provides that:

"In our view, however, the decision as to whether an employer is negligent in hiring or retaining a person in a given job should be made by the fact finder after hearing evidence." Gaines, at 572.

In the final analysis, Hamilton argues a lack of a duty owed at the time of the death of Stephanie Schmidt. Hamilton's brief is quite well-prepared and very extensively, and correctly, discusses existing torn law as it relates to the concept of duty regarding a tortfeasor or an injured party. Obviously it must be shown that Hamilton possessed a duty towards the decedent before potential liability can attach. Honeycutt, supra. Indeed, the plaintiffs do not deny this requirement. Rather, in order to satisfy the duty requirement, the plaintiffs merely point out that case law mandates than an employer exercise due care in the hiring of co-employees. See Hollinger, Jackson, and Gaines, supra. The plaintiffs allege that it was this recognized duty that was abrogated by Hamilton in the hiring and retaining of Gideon while the decedent was an employee of the restaurant. Thy is when the tort is alleged to have been initiated and which allegedly set off a chain-of-events fall

within the realm of foreseeability is a matter to be determined by a jury.

Counsel for Hamilton stated during oral argument on the summary judgment motion that the plaintiffs had not addressed duty in their brief. Yet the sundry cases cited by the plaintiffs very definitely discuss, and impose, a duty upon an employer to hire appropriate employees. This is a duty wholly independent of that imposed by the Restatement (Second) of Torts, Sec. 315 (1964).

In the final analysis, the Court notes that a district court is required to resolve all facts and inferences which can be reasonably deduced from the evidence in favor of the party opposing a motion for summary judgment. Allsup v. Mount Carmel Medical Center, 22 Kan. Ap. 2d 61, 166. With this in mind, and in keeping with the aforementioned findings and conclusions, the Court denies the motion for summary judgment filed by Hamilton. The Court finds that a duty did exist at a time when the decedent was employed by Hamilton, and that duty is the requirement that suitable co-employees be hired and retained. Whether that duty was breached and whether any alleged breach resulted in the foreseeable murder of the decedent is a question to be addressed by the jury The Court, however, does agree that the decedent's sister, Jennifer Schmidt, is not a recognizable "heir at law" who has sustained a loss because both of the decedent's parents are living. Accordingly, the Court finds that Jennifer Schmidt has no actionable wrongful death claim in this matter and she is deleted as a party.

CONCLUSIONS OF LAW REGARDING STATE DEFENDANTS' MOTION OF SUMMARY JUDGMENT

Initially, the Court adopts the Summary Judgment standards expressed in the Court's Conclusions of Law Regarding Hamilton Motion for Summary Judgment.

STATE CLAIMS

Kansas appellate courts have long held that a person, including a government official, can be held liable in damages to an individual harmed by the actions of third person if, "(1) a special relationship exists between the actor and the third person which imposes a duty upon the actor to control the third person or to warn others about that third persons' dangerous propensities, or (2) a special relationship exists between the actor and the other which gives rise to the other a right to protection." Washington v. State of Kansas, 17 Kan.App. 2d 518, 521.

A "special relationship" may exist between a parent and child, master and servant, the possessor of land and licensees, persons in charge of one with dangerous propensities, and persons with custody of another. Nero v. Kansas State University, 253 Kan. 567. The Kansas Supreme Court has further observed that a duty or special relationship may arise when one creates a foreseeable peril, which is not readily discoverable, and fails to warn of the risk. Robertson v. City of Topeka, 231 Kan. 358.

The Restatement of (Second) of Torts, Sec. 315, has observed that when a defendant stands in a special relationship to either the dangerous person or the

potential victim, the defendant is required to control the dangerous person or warn or otherwise protect the victim.

Plaintiffs cite Division of Corrections v. Neakok, 731 P.2d 1121, in support of their position herein. Neakok is of assistance to the Court. It essentially provides that a special relationship exists between a parole officer and the parolee he supervises. The Neakok decision indicates that a parole officer has a duty to warn the foreseeable victims of a parolee with dangerous propensities. Id. At 1130. The opinion observed that generally a duty to warn applies only to specifically identifiable victims, however, this requirement does not mean that a particular named individual need be identified as a potential victim. Rather, it is only necessary that a "readily identifiable group of victims" be ascertained. Id. At 1132.

Additional guidance in determining duty is provided by Rieser v. District of Columbia, 563 F.2d 462. The Rieser opinion observed:

> "Placement of Whalen [the parolee] in a maintenance position at McLean Gardens put him close proximity to the women tenants, with the opportunity to observe their habits, and gave him potential access to the keys to their apartments and dormitory rooms... The jury could conclude that a breach of Abron's general duty would present a specific and unreasonable risk of harm to the women tenants of McLean Gardens therefore giving rise to a special duty toward them. On this theory, it was not error to allow

the question of liability to go to the jury." Reiser. at 479.

In the present matter, Gidoen was a parolee under the direct supervision of defendant Schirk. Schirk was aware of Gideon's pst record and was aware that Gideon was potentially dangerous. It is readily apparent that a special relationship existed between Schirk (parole officer) and Gideon (parolee). Moreover, as the Court observed in its Finding of Fact, the DOC had adopted an unwritten policy of warning individuals potentially at risk from parolees. After adopting this policy, it hen became incumbent upon the DOC to administer this policy in an effective manner. This observation applies all the more strongly to members of a "readily identifiable group of victims" (Hamiltons' waitresses).

The state defendants further argue that Schirks actions were discretionary and accordingly he is immune from suit pursuant to K.S.A. 75-6104(e). The Kansas Supreme Court recently addressed this issue in C.J.W. v. State of Kansas, 253 Kan. 1. In C.J.W., the Court held:

> "Simply stated, our more recent cases hold that the discretionary function exception is to applicable in those situations where a legal duty exists, either by case law or statute, which the governmental agency is required to follow. The governmental agency cannot properly claim that its challenged action falls within the discretionary function exception where the actin taken violated a legal duty." C.J.W., at 14.

Moreover, our Supreme Court has stated:

> "The Kansas Tort Claims Act make liability the rule and immunity the exception, and the burden is on the State to establish its entitlement to any of the exceptions set forth in K.S.A. 1992 Supp. 75-6104. If the State cannot meet this burden, then the general rule of liability set forth in K.S.A. 75-6103 governs." C.J.W., Syl. 6.

Our Supreme Court has further observed that:

> "Under the Kansas Tort Claims Act, a governmental agency does not have a discretionary right to violate a legal duty and avoid liability. To so hold would completely nullify the purpose of the Kansas Tort Claims Act." Dougan v. Rossville Drainage Dist, 243 Kan. 315, 325.

It is then readily apparent that if a legal duty exists, the government cannot utilize the discretionary function exception. Our Supreme Court has referred to the Restatement (Second) of Torts, Sections 315 and 319 in prior cases in which it was found that the State did indeed have a duty:

> "It is the rule in this state that one who takes charge of a third person, whom he knows or should know to be likely to cause bodily harm to others if not

> controlled, is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." Cansler v. State, 234 Kan. 554, Syl. 1.

This Court has previously found that a "special relationship" existed between the state defendants and Gideon. This finding is supported by the above-referenced case law and the Restatement (Second) of Torts. It can hardly be argued that the state defendants did not take charge of Gideon. Accordingly, the Court finds that a duty existed on the part of the state defendants as those in charge of a person with dangerous propensities. Having found that a duty existed, the court finds that the discretionary function exception does not apply herein.

Moreover, it can be argued that the DOC's adoption of the unwritten warning policy created a duty to those potentially and identifiably at risk. Accordingly, an alleged breach of said duty would certainly mitigate against the discretionary function exception.

The state defendants further allege that they are entitled to the police function immunity provided by KSA 75-6104(n). This defense does not apply when the underlying basis for the action is premised upon the breach of a specific duty owed to an individual as opposed to the public at large. Washington v. Kansas, 17 Kan.App.2d 518. Further, the plaintiffs' claims are based upon negligent supervision, not a failure to provide police protection. Clearly this defense is not applicable.

The plaintiffs stipulate that Jennifer's state claims are not presently permissible pursuant to Kansas law.

Accordingly, the motion for summary judgment with respect to Jennifer's state claims is sustained. The motion for summary judgment with regard to the state claims of the remaining plaintiffs is denied.

CLAIMS PURSUANT TO 42 U.S.C. SECTION 1983

The state defendants essentially argue that summary judgment is appropriate with respect to the plaintiffs' Section 1983 claims because the plaintiffs cannot demonstrate either of the two exceptions to the general rule that state actors are normally liable under the Due Process Clause for their own acts and not for private misdeeds. The two recognized exceptions are: (1) the special relationship doctrine; and (2) the "danger creation" theory. DeShaney v. Winnebago County Dept. Social Services, 489 U.S. 189.

Before further discussion of this matter, the Court notes that plaintiffs acknowledge that their Section 1983 claims against the State of Kansas and the DOC are not presently allowed under law. Accordingly, summary judgment is granted with respect to the Section 1983 claims against the State of Kansas ant the DOC. That leaves the Section 1983 claim against Schirk to be resolved.

Of the two recognizable exceptions in DeShaney, only the "danger creation" theory is germane herein. The Tenth Circuit has addressed the "danger creation" theory and has indicated that the necessary elements for proving the theory are as follow:

1. The party aggrieved must be a member of a limited and specifically identifiable group;
2. The defendant's conduct placed the

aggrieved party at substantial risk of serious and immediate harm;

3. The risk was obvious and known;
4. The defendant acted recklessly in conscious disregard of that risk; and,
5. The conduct, when viewed in total, is shocking to the conscience. Medina v. City and County of Denver, 960 F.2d 1493; and. Collins v. City of Harker Heights, Tex., 503 U.S. 115.

Essentially the state defendants argue that there is no showing that the actions of Schirk were in reckless or conscious disregard of risk, and that Schirk's conduct does not shock the conscience when viewed in the totality of the circumstances. It is necessary to define "reckless conduct" before this matter can be further addressed. "Reckless conduct" before this matter can be further addressed. "Reckless conduct" has been defined as an awareness or knowledge of an "obvious risk that was so great that it was highly probable that serious harm would follow an the or she proceeded in conscious and unreasonable disregard of the consequences." Medina, pg. 1496, (emphasis supplied). Moreover, it has been observed that a Section 1983 claim must be predicated on state action manifesting either an intent or harm or an intent to place a person unreasonably at risk of harm. Medina, Id., (emphasis supplied).

The "shock the conscience" standard cannot be met by ordinary negligent conduct. This standard traditionally presupposes deliberate wrongful decisions as opposed to negligent governmental conduct. A due process violation giving rise to a Section 1983 claim must be more than an ordinary tort to be actionable. Collins, supra, at 127-28.

Although plaintiffs argue quite strongly that Schirk's conduct was reckless, the Court disagrees. Arguably Schirk's conduct is actionable in the traditional "tort" sense of the word, yet the Court does not find that the record supports a showing of reckless conduct. That is, the plaintiffs have failed to demonstrate that Schirk was aware of a risk to Ms. Schmidt so great that it was highly probable that serious harm would occur. Nor have the plaintiffs demonstrated that Schirk proceeded in a conscious and unreasonable disregard of probable consequences with an intent to harm or an intent to place Ms. Schmidt in an unreasonable risk of harm. Again, it can perhaps be argued that Schirk's conduct was negligent, yet the complained of conduct falls short of that which is contemplated by a Section 1983 claim.

The facts which were developed in the discovery phase support this conclusion. Undeniably Schirk was aware that sex offenders are a high risk of re-offending. A logical extension of this awareness would be the knowledge that Gideon's female co-employees were at risk. Yet Schirk at that point in time had been given no reason to believe that Gideon was engaging in any inappropriate behavior which focused on the Hamilton waitresses. Gideon reported to Schirk as ordered, indicated no problems at work, and had maintained the same job for seven months. There was noting about Gideon's know conduct which would indicate to Schirk that the Hamilton waitresses were in specific danger of imminent harm. Accordingly, the plaintiffs have been unable to demonstrate either an intent to harm or an intent to place a person unreasonably at risk of harm, as per the requirement of Medina, supra.

As previously noted, the Court is required to consider the totality of the surrounding circumstances in

ruling on the propriety of a Section 1983 claim. Medina, supra. In doing go, the Court notes that Schirk's role i the supervene of Gidoen involved the balancing of competing interests: the protection of the public versus the rehabilitation of an offender. This as times is a difficult balancing act to accomplish. The Court has closely scrutinize Schirk's actions in fulfilling this role. The court does not find that Schirk's errors, if any, are so egregious and outrageous that the Court's conscience is shocked. Accordingly, summary judgment is granted to the state defendants with regard to the plaintiff's claims pursuant to 42 U.S.C. Section 1983.

Mr. Adler shall prepare a journal entry consistent with this opinion.

APPENDIX C

SCHMIDT, et al.,
Appellees/Cross-appellants,
v.
HTG, INC., et al.,
Appellants/Cross-appellees.
Nos. 79039, 79,040.
District Court of Crawford County, Kansas
December 5, 1996
Syllabus of the Court

JOURNAL ENTRY OF JUDGMENT

NOW on this 6th day of May, 1997, the Court takes up state defendants' Motion for Summary Judgment as well as the Motion for Summary Judgment of defendants HTG, Inc. and Thomas Hamilton. The parties have filed briefs and appeared for oral argument on May 21, 1996. Plaintiffs appear by and through James F. Adler and Carlton Kennard. Defendants HTG, Inc. and Thomas Hamilton (Hamilton's) appear by and through legal counsel Michael K. Seck. Defendants State of Kansas, Department of Corrections and Robert Schirk (state defendants) appear by and through legal counsel Lisa A. Mendoza and Edward F. Britton, Jr. There are no other appearances.

WHEREUPON the Court, having reviewed the file, having heard the arguments of the parties, and being otherwise fully advised in the premises makes the following findings:

1. The Court has earlier ruled and reaffirms that having considered the affidavits, exhibits, and memoranda filed in support of the Motions for Summary Judgment of state defendants, HTG, Inc. and

Thomas Hamilton, and plaintiffs' response thereto, that these Motions are properly treated by the Court as Motions for Summary Judgment. The Court further finds that these Motions should be and are hereby affirmed in part and denied in part.

2. The Court adopts and incorporates herein by this reference the Findings of Fact, Nos. 1-26 as set forth in its Memorandum Decision, pp. 2-7, filed on December 5, 1996.

3. The Court further adopts and incorporates herein by this reference its Conclusions of Law Regarding Hamilton Motion for Summary Judgment set forth at pp. 8-15, and Conclusions of Law Regarding State Defendants' Motion for Summary Judgment set forth at pp. 15-23 of its Memorandum Decision dated December 5, 1996, finding that (1) plaintiff Jennifer Schmidt is not a recognizable "heir at law" who has sustained a loss because both of decedent's parents are living, that she has not actionable wrongful death claim in this matter against either Hamilton defendants of state defendants and she is deleted as a party plaintiff; (2) the Motion for Summary Judgment of the Hamilton defendants is denied; (3) the Motion for Summary Judgment of the state defendants on plaintiffs' state claims is denied; and (4) the Motion for Summary Judgment of state defendants on plaintiffs' claims pursuant to 42 U.S.C. § 1983 is granted.

4. Though the Court herein enters judgment on fewer than all of the claims of parties to the litigation and/or against less than all parties, the Court intends and finds that pursuant to K.S.A. 60-254(b) that there is no just reason for delay and expressly directs the entry of judgment on these claims and with respect to its rulings on the motions for summary judgment. This

judgment, therefore, is and is intended to be a final judgment authorizing interlocutory appeals by all parties from the entry of this judgment.

5. The Court further finds that pursuant to K.S.A. 60-2102(b) its rulings on State Defendants' Motion for Summary Judgment as well as on the rulings concerning defendants HTG, Inc. and Thomas Hamilton involve a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from he order(s) may materially advance the ultimate termination of the litigation.

IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED that plaintiff Jennifer Schmidt is dismissed as a party to this action.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment of defendant HTG, Inc. and Thomas Hamilton is denied.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment of state defendants is granted in part and denied in part. With respect to plaintiffs' claims pursuant to 42 U.S.C. § 1983, state defendants' Motion for Summary Judgment is granted; however, state defendants' Motion for Summary Judgment on plaintiffs' state claims is denied.

IT IS FURTHER BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED though judgment herein is entered on fewer than all of the claims of parties to the litigation and/or against less than all parties, the Court intends and finds that pursuant to K.S.A. 60-254(b) that there is no just reason for delay and expressly directs the entry of

judgment on these claims and with respect to its rulings on the motions for summary judgment. This judgment, therefore, is and is intended to be a final judgment authorizing interlocutory appeals by all parties from the entry of this judgment.

IT IS FURTHER BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED that pursuant to K.S.A. 60-2102(b) its ruling on State Defendants' Motion for Summary Judgment as well as on the rulings concerning defendants HTG, Inc. and Thomas Hamilton Motion for Summary Judgment involve a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order(s) may materially advance the ultimate termination of the litigation.

IT IS SO ORDERED.

Supreme Court, U.S.
FILED
SEP 29 1998
OFFICE OF THE CLERK

(3)

No. 98-382

In The

Supreme Court of the United States

October Term 1997

GENE SCHMIDT and PEGGY SCHMIDT, the heirs of Decedent STEPHANIE SCHMIDT, and GENE SCHMIDT, the special administrator of her Estate, on behalf of STEPHANIE SCHMIDT,

Petitioners,

v.

HTG, INC., THOMAS E. HAMILTON, the STATE OF KANSAS, KANSAS DEPARTMENT OF CORRECTIONS, and ROBERT SCHIRK,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kansas

BRIEF FOR RESPONDENTS STATE OF KANSAS, KANSAS DEPARTMENT OF CORRECTIONS AND ROBERT SCHIRK IN OPPOSITION

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BRIEF FOR RESPONDENTS STATE OF KANSAS, KANSAS DEPARTMENT OF CORRECTIONS AND ROBERT SCHIRK IN OPPOSITION

The State of Kansas, Kansas Department of Corrections and Robert Schirk ("state respondents") oppose the petition of Gene and Peggy Schmidt ("petitioners"), the heirs of decedent Stephanie Schmidt ("decedent"), and Gene Schmidt, the special administrator of her estate, on behalf of Stephanie Schmidt for a writ of certiorari to the United States Supreme Court.

STATEMENT OF THE CASE

The Statement of the Case as stated in the Petition for a Writ of Certiorari contains exaggerations and inaccuracies, but since they do not relate to the ground of the Kansas Supreme Court decision, there is no good reason to go into detailed factual matters here.

The facts with respect to petitioners' claims and alleged damages are fully reviewed in the Kansas Supreme Court opinion. [App. A4-A9] The evidence relating to the State of Kansas Department of Corrections Internal Management Policies and Procedures, which the petition does purport to summarize and interpret, is inaccurate, but would not warrant reversal of the Kansas Supreme Court since petitioners are not entitled to recover in the absence of any legal duty, the absence of any adequate proof of actual knowledge of a specific risk of harm to the decedent and where state officials, in any event, are entitled to immunity in accordance with clear exceptions to state tort claims act.

As the Court will discover when it compares the Petition for a Writ of Certiorari with the opinion of the Kansas Supreme Court, the questions which petitioners seek to present here do not pertain to the principal grounds upon which the Kansas Supreme Court decided the case. (The opinion of the Kansas Supreme Court is set forth as an Appendix in the Petition for a Writ of Certiorari to the Supreme Court of Kansas, hereinafter cited as App. A.)

The questions actually presented by the decision below are:

1. Whether parole officer's conduct establishes requisite elements under a Section 1983 claim of danger creation so that parole officer as a State actor may be held liable under the Due Process Clause to the United States Constitution for private misdeeds? [App. A11]

2. Whether parole officer owed duty to warn parolee's employer of parolee's criminal history and dangerous propensities such that liability could be imposed on a theory of negligence under state tort law? [App. A13]

3. Whether the Kansas Tort Claims Act, Kan. Stat. Ann. 75-6104, provides immunity to petitioners' claims for damages? [App. A27]

REASONS FOR DENYING THE WRIT

I.

THIS CASE DOES NOT MEET THE REQUIREMENTS OF THIS COURT'S RULES FOR GRANTING A PETITION FOR WRIT OF CERTIORARI

Beyond doubt, the instant case in no way satisfies the standards set out in Rule 10 of the Supreme Court Rules for granting a petition for a writ of certiorari. The issues turning on the facts of record in the instant case (see App. A4-A9) are neither "compelling reasons" nor "an important federal question" involving conflicts with other decisions of this Court, the United States courts of appeals or the decision of another state court of last resort. The United States Supreme Court does not "grant certiorari to review evidence and discuss specific facts" (*United States v. Johnston*, 268 U.S. 220, 227 (1925)), except in extraordinary circumstances. The instant case presents no such extraordinary circumstance.

II.

THE STATE OF TORT LAW RELATING TO GOVERNMENTAL AND PUBLIC OFFICIAL LIABILITY DOES NOT WARRANT REVIEW BY THIS COURT

The decision of the Kansas Supreme Court was correct, turned on the evidence and the record in the case, and there is no good reason contemplated within the considerations governing review on certiorari to overturn that decision.

First, the decision that there was no genuine issue of material fact to preclude summary judgment is not challenged in the petition, and was clearly correct. The

unchallenged determination by the Kansas Supreme Court in the instant case that there was insufficient evidence of actual knowledge on the part of state officials of a specific risk of harm to decedent as an identifiable third party at risk from the criminal acts of this particular post-release supervised offender (Donald Ray Gideon) necessary to go to jury trial would inevitably be dispositive on remand.

Second, few points are raised in the petition about the reasoning and logic of the Kansas Supreme Court, and none would warrant a reversal of that court's judgment in this case. There was ample basis in pre-existing state and federal law for the Kansas Supreme Court to select the appropriate legal standards necessary to determine the proper resolution of the issues raised by the facts of the instant case.

In Kansas, as in the other identified jurisdictions, negligence exists only where there is a duty owed by one person to another, and a breach of that duty occurs. If recovery is to be had for such negligence, the injured party must show: (1) a causal connection between the duty breached and the injury received; and (2) he or she was damaged by the negligence. An accident, disaster, or calamity, which is not reasonable to be foreseen by the exercise of reasonable care and prudence, is not sufficient grounds for a negligence action.

In Kansas, it is a fundamental rule that actionable negligence must be based on a breach of duty. *Blackmore v. Auer*, 187 Kan. 434, 440, 357 P.2d 765 (1960). The decision in *Robertson v. City of Topeka*, 231 Kan. 358, 644 P.2d

458 (1982), recognized a special relationship between certain persons could give rise to a duty. Whether a duty exists is a question of law. Whether a duty has been breached is a question of fact. Further, whether there is a causal connection between the breached duty and the injuries sustained is also a question of fact. *Durflinger v. Artiles*, 234 Kan. 484, 488, 67 P.2d 86 (1983).

The Kansas Supreme Court recognized the duty to warn based upon an assertion that the plaintiff and the State had a special relationship in *Cansler v. State*, 234 Kan. 554, 675 P.2d 57 (1984), when the court adopted Restatement (Second) of Torts §§315 and 319 (1965). *Cansler* involved the armed escape of seven (7) convicted murderers from the Kansas State Penitentiary in Lansing, Leavenworth County, Kansas. No warning of this event issued to area law enforcement, of which plaintiff was a member. While attempting to stop a speeding vehicle, the plaintiff officer was seriously injured by the escaping felons. The officer filed suit against the State and Leavenworth County for his injuries. The Kansas Supreme Court held that under the Restatement, the State has a common law duty to confine the inmates and to warn upon their escape and, further, that the State has a special relationship with law enforcement officers in the surrounding community, including plaintiff. The Kansas court expressly took note, however, that the *Cansler* decision and its holding should be limited to its particular facts.

Just prior to the instant case, in *C.J.W. v. State*, 253 Kan. 1, Syl. ¶1, 853 P.2d 4 (1993), and *Cupples v. Kansas*, 18 Kan.App.2d 864, 861 P.2d 1360 (1993), the Kansas courts addressed the nature as well as the contours of the duty

of public employees to control the conduct of third persons so as to prevent them from intentionally harming others. The courts determined that whether such duty exists is a question of law. The courts held that in Kansas, this duty turns on whether the defendant has knowledge of a specific risk of harm to an identifiable victim.

In *Jarboe v. Board of Sedgwick County Comm'rs*, 262 Kan. 615, Syl. ¶1, 938 P.2d 1293 (1997), the Kansas Supreme Court held that prior case law permitting a duty to be based upon the failure to follow written personnel policies was superseded by the legislative enactment of Kan. Stat. Ann. 75-6104(d). In Kansas, liability can no longer be established by the failure to follow such a policy unless an independent duty of care is owed. Consistent with this result and holding is the recent case of *Woodruff v. City of Ottawa*, 263 Kan. 557, 566, 951 P.2d 953 (1997), where the Kansas Supreme Court also rejected the argument that an unwritten policy was created such that a police officer owed a duty to protect plaintiffs from the conduct of a third party.

Neither these legal standards, nor the outcome in the instant case, implicate an important federal question or involve conflicts with other decisions of this Court, the United States courts of appeal, or the decision of another State court of last resort contemplated by Rule 10 of the Supreme Court Rules for granting petitions for writ of certiorari.

The Kansas Supreme Court carefully distinguished the decisions from other jurisdictions upon which the plaintiffs rely, in particular *Division of Corrections v. Neakok*, 721 P.2d 1121 (Alaska 1986), and *Rieser v. District*

of Columbia, 563 F.2d 462 (D.C. 1977), upon their facts, as well as the differing basis for the legal conclusions reached in these other jurisdictions. A close reading of the authority asserted by petitioners in the instant case discloses these cases were rejected by the Kansas Supreme Court simply because they were inapposite to the facts presented and the issues raised therefore by the instant case. [App. A18-A26]

In *Taggart v. State*, 118 Wash.2d 195, 822 P.2d 243 (1992), suit was brought by plaintiffs injured by parolees in separate assaults on claims of negligent parole supervision because the parole officers never contacted the parolees' friends or employers, never required one parolee to submit to required drug testing, and/or knew that parolees had violated various conditions of parole by quitting job, changing address without notification and failing to report, but never took corrective action. Under these circumstances, the Washington court held that the State had a duty to protect against reasonably foreseeable dangers posed by the unchecked dangerous propensities of parolees. The parole officers completely abdicated their responsibility to maintain a "definite, established and continuing relationship" with the parolees under their supervision sufficient to bring the parole officers' conduct within the scope of Restatement (Second) of Tort provisions. Even so, the court held that the announced duty "arises only once it has been shown that the defendant parole officer lacks both absolute and qualified immunity. To pierce these immunities, the plaintiff must show, first, that the officer's actions were not an integral part of any judicial or quasi-judicial process, and second,

that the officer failed to perform a statutory duty according to procedures dictated by statute and superiors."

In *Division of Corrections v. Neakok*, 721 P.2d 1121 (Alaska 1986), suit was brought by relatives of murder victims of another parolee with whom the parole officer completely failed to maintain a definite, established and continuing relationship. The Alaska court essentially held that the failure to take charge of and to monitor the parolee in a remote settlement established the basis for a duty to protect against the reasonably foreseeable dangers posed by the unchecked dangerous propensities of this parolee.

There was no evidence in the record of the instant case of an identical, or even similar, complete abdication by the parole officer of his responsibility to take charge or to monitor the supervised offender. Nor was evidence presented which was sufficient to pierce the defendants' entitlement to immunity under the Kansas Tort Claims Act. The evidence in the instant case is that the parole officer did not neglect or fail to maintain a "definite, established and continuing relationship" with the parolee under his supervision. [App. A5-A8; App. A11-A13; App. A29-A30]

In *Rieser v. District of Columbia*, 562 F.2d 462 (D.C. Cir. 1977), father brought suit against the District of Columbia to recover damages for his daughter's rape and murder by a parolee employed at the apartment complex in which daughter resided. The circuit court held that an exception to the general rule of governmental non-liability applied to the parole officer because the parolee's

maintenance position made the parolee a "virtual member of the victim's household" with opportunity to closely monitor her habits and unfettered access to her home. In addition, the parole officer listed on an employment referral form only that the parolee has been convicted of robbery, failed to mention he was a convicted rapist, failed to mention that he was a suspect in three (3) murders which had occurred at the apartment community he had previously worked at, and placed no restrictions upon the type of work appropriate to him.

On similar grounds, in *Bonnie W. v. Commonwealth*, 643 N.E.2d 424, 419 Mass. 122 (1994), the Massachusetts court held, in a suit brought by a sexual assault victim based on the alleged negligence of her attacker's parole officer, that the state tort claims act did not bar "claim that officer contributed to injury by negligently recommending attacker's continuing employment at trailer park where victim lived and by misrepresenting attacker's criminal history to park management." Plaintiff's alternative theory based on negligent supervision or failure to supervise was held to be expressly barred by the state tort claims act, however. Plaintiff was sexually assaulted in her mobile trailer home located on leased space in a privately owned trailer park where the attacker was employed by the owners of the trailer park as a maintenance man and had keys to all the units in the park in connection with his employment.

In *Thompson v. County of Alameda*, 27 Cal.3d 741, 167 Cal.Rptr. 70, 614 P.2d 728 (1980), reh. denied (1980), judgment of dismissal was affirmed by the California court because the county was either statutorily immunized from liability or alternatively, bore no affirmative duty

that it failed to perform under the facts. Parents brought suit against the county for damages in the sexual assault and murder of their five (5) year old son by a juvenile delinquent known to have dangerous and violent propensities toward young children within twenty-four (24) hours after being released to the custody of his mother.

Third, the petition in the instant case essentially seeks review of discretionary civil agency enforcement action by a state agency which is inappropriate for judicial review pursuant to common law and which has, in Kansas, a constitutional Separation of Powers basis. In discussing discretionary immunity under the Kansas Tort Claims Act, Kan. Stat. Ann. 75-6104(e), the Kansas Supreme Court has repeatedly stated:

> "We do not believe that the legislature, in enacting the Kansas Tort Claims Act, intended to subject parole or probation decisions of the authorities, whether the Kansas Adult Authority or the sentencing judge, to litigation in order to determine whether the Authority or judge turned every tap and jumped through every hoop in arriving at a decision to place an inmate on parole or to impose conditions on conditional release. It is these discretionary functions of state agencies or employees which the legislature intended to place beyond the pale of tort litigation.
>
> The possibility of harm to third persons exists every time a prisoner convicted of violent crime is released from custody and placed back into society, yet the time always arrives when release must be effected."

Beck v. Kansas Adult Authority, 241 Kan. 13, 36, 735 P.2d 222 (1987). [App. A28-29]

Fourth, the consistent line of decisions of this Court specifically dealing with claims based on the criminal acts of offenders, prisoners, patients and others have uniformly held that public officials owe no legal duty arising from any special relationship with individual members of the public absent knowledge of a specific risk to an identifiable third party.

In *Martinez v. California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980), suit was brought by the survivors for damages to recover for the torture and murder of a fifteen (15) year old girl by a parolee who had been released from prison despite his history as a sex offender. In addition, in making their release determination, public employees also failed to observe certain "requisite formalities." The parolee committed this heinous crime about five (5) months after his release.

The Court determined that under these circumstances, the decedent's death was too remote a consequence of the parole decision and of the parole officer's actions to hold them or the State responsible under the federal civil rights law. Citing *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), the Court held that the survivors simply had not alleged a claim for relief under federal law.

In *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 197, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989), this Court addressed the issue of imposing liability on the State as well as individual social workers for the negligent handling of child abuse reports. The child

was returned to his father by state child welfare authorities. He was left there even after state authorities received reports of severe child abuse. Ultimately, the child was beaten so severely he would be retarded for the rest of his life.

The Court held that the authorities were not liable under Section 1983; a State's failure to remove a child from his home even after receiving reports of severe child abuse did not violate the child's due process rights under the Fourteenth Amendment. Although the Court foreclosed the possibility of liability on this basis under the United States Constitution, the door was left open for the individual States to elect to create a duty of care under their own tort law.

The Court noted that the case would be different if the State had custody of the child and placed it with foster parents who it knew or strongly suspected would abuse the child, or if the State had arrested the parents and left the child alone in a situation where it was foreseeable he was likely to come to grief because no one was watching him.

In *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995), cert. denied, 116 S.Ct. 924 (1996), suit was brought by the surviving husband of an activity therapist killed by a mental hospital patient against state mental health administrators for eliminating a special unit in the mental hospital under a creation of danger theory. The patient had formerly been confined in this special unit. This patient had attacked another patient in the past. He also had spent over a year in the general hospital population without incident.

The Tenth Circuit rejected this claim under the creation of danger theory and ruled for defendants on summary judgment, determining that plaintiff failed to demonstrate that defendants' decision to eliminate the special unit truly "shocked the conscience," for recklessness, and that in any event, defendants' qualified immunity shielded them from liability.

III.

WELL ESTABLISHED PRINCIPLES OF FEDERALISM AND STATE SOVEREIGNTY AS WELL AS A FEDERAL STATUTE, THE VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994 (COMMONLY KNOWN AS THE JACOB WETTERLING ACT), 42 U.S.C. §14071, RELIEVES THE COURT FROM THE NECESSITY OF ESTABLISHING NATIONWIDE STANDARDS FOR POST-RELEASE SUPERVISION OF OFFENDERS

Petitioners essentially argue for strict liability under the Fourteenth Amendment for crimes committed by sex offenders based on a theory that such crimes are a per se violation of substantive due process. In petitioners' view, the mere fact that sex offenders are "highly likely to reoffend" is alone sufficient to establish evidence of deliberate indifference and reckless disregard whenever the State or state actors fail to prevent such crimes from occurring. This failure constitutes the deliberate indifference and reckless disregard, they argue, constitutionally cognizable under the "shock the conscience" standard. "Big Brother" must be liable because the crime would not have occurred if he had not blinked. Consequently, national standards are indicated.

This is nonsense on stilts. These conclusory allegations are unsupported by the decisions of this Court, as well as the decisions in the Tenth Circuit, and Kansas appellate courts. Furthermore, petitioners' proposal that nationalized standards for post-release supervision of sex offenders are therefore necessary is proscribed by well-established principles of judicial restraint, federalism, and state sovereignty.

The State's interest in fashioning its own rules of tort law is paramount to any discernable federal interest in nationalized standards for the post-release supervision of offenders urged by petitioners in the instant case. Further, Kansas statutes and regulations have not been shown to be irrational or to regularly expose individual citizens to wholly arbitrary or irrational state action expressly prohibited by the United States Constitution.

In any event, any such nationalized standard for the post-release supervision of offenders is unwarranted for unnecessarily impinging on the Kansas legislature, as well as state judicial review of parole decisions, and would inevitably inhibit exercise of the State's discretion under its own Constitution, as well as impair the State's ability to implement a parole program tailored to promote rehabilitation of offenders in Kansas consistent with local resources, including the security within state prison facilities through the holding out of the promise of potential rewards for good behavior, voluntary participation in programs, and enhanced privilege classifications.

Petitioners rely on *Kansas v. Hendricks*, 117 S.Ct. 2072 (1997), to support their petition. This case is best understood and explained as a civil commitment case for the

treatment of sex offenders who suffer from a "mental abnormality" at the time of their release from prison. In this light, this Court's decision in *Hendricks* has few if any implications for Court-imposed nationalized standards in public safety laws. (In any event, there is no evidence in the record that Donald Ray Gideon was ever diagnosed or civilly adjudged "mentally abnormal" at the time of his release from prison; hence, *Hendricks* has no bearing on the resolution of the instant case.)

As a practical matter, virtually all of the States, with the financial encouragement of the federal government, now have sex offender registration laws. See 42 U.S.C. §14071, et seq.; see also *Megan's Law*, Pub. L. 104-145, 110 Stat. 1345 (May 17, 1996). Many states also provide for some form of community notification or public access to the registrant information. See generally, Stephen R. McAllister, *Neighbors Beware: The Constitutionality of State Sex Offender Registration and Notification Laws*, 29 Texas Tech. L. Rev ___ (1998).

In Kansas, the legislature has enacted the Kansas Sex Offender Registration Act (KSORA), Kan. Stat. Ann. 22-4901, et seq., which would appear to dispose of petitioners' claims concerning notification of the criminal history of individuals convicted of violent sex crimes. The constitutionality of the Kansas statute was upheld by the Kansas Supreme Court. See *State v. Myers*, 260 Kan. 669, 193 P.2d 1024 (1996) (under ex post facto analysis); and *State v. Scott*, No. 75,684 (Kansas Supreme Court, May 29, 1998) (under cruel and unusual analysis). The KSORA requires individuals convicted of a sexually violent crime to register with the State as a sex offender, as well as to provide DNA exemplars, including blood and saliva. The

purpose of the law is to protect people by providing the public with the broadest possible access to information about sex offenders in their communities.

Many other states now allow broad public access to sex offender registration information under legislative enactments similar to that in Kansas. Virtually every state permits some public access, and all require sex offenders to register. See, e.g., Alaska Stat. §12.63.010, et seq. (1996); Colo. Rev. Stat. §18-3-412.5 (1997 Supp.); Fla. Stat. §944.606 (1997); Hawaii Rev. Stat. §846E-1, et seq. (1997); Iowa Code §692A.1 , et seq. (1998 Supp.); Mass. Gen. L. Ch. 6, §178C, et seq. (1996); Mich. Comp. Laws Ann. §28.721, et seq. (1997).

IV.

THE GRANT OF A WRIT OF CERTIORARI IS NOT WARRANTED BECAUSE THE LAW IN THE TENTH CIRCUIT IS CLEARLY ESTABLISHED AND CONSISTENT WITH THIS COURT'S RECENT DECISIONS

Petitioners allege state respondents violated decedent's Fourteenth Amendment right to substantive due process by creating a dangerous situation and failing to protect decedent from a third party, resulting in her death. Petitioners contend that all government conduct that is indifferent to life, liberty, or property violates the Due Process Clause, and that their allegations of such executive abuse based on state respondents' failure to notify the decedent and/or the supervised post-release offender's employer of his criminal history states a cognizable claim of deliberate indifference to or reckless disregard for a person's right to life and personal security

which "shocks the conscience." Against this backdrop, petitioners urge that the grant of a Writ of Certiorari to the United States Supreme Court is necessary to establish an objective standard for this test which will resolve conflicts among the circuit courts of appeal as well as the subjectivity present in the judges who sit in the Tenth Circuit.

This Court granted certiorari, 520 U.S. ___, 117 S.Ct. 2406, 138 L.Ed.2d 173 (1997), in the case of *County of Sacramento v. Lewis*, 523 U.S. ___, 118 S.Ct. ___, 140 L.Ed.2d 1043 (1998), precisely to resolve conflict among the circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process. In *Lewis*, suit was brought by the personal representative of the estate of the decedent, a sixteen (16) year old motorcycle passenger killed as a result of being accidentally struck by a deputy's patrol car at the end of a high speed chase, for the recovery of damages under the Due Process Clause of the Fourteenth Amendment. At issue in the case was whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high speed automobile chase aimed at apprehending a suspected offender.

The Court has consistently emphasized, time and time again, that "[t]he touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). Although the specific focus of the Court in *Lewis* was high speed pursuit by police officers, legal analysis in the case broadly encompassed objective determination of the constitutionally cognizable

level of executive abuse, deliberate indifference to, or reckless disregard for, a person's right to life and personal security which "shocks the conscience." This determination was chiefly posited on the Court's recognition of conflict among the circuits, i.e., comparing *Lewis v. Sacramento*, 98 F.3d 434, 441 (9th Cir. 1996) ("deliberate indifference" or "reckless disregard"); *Evans v. Avery*, 100 F.3d 1033, 1038 (1st Cir. 1996) ("shocks the conscience"), cert. denied, 520 U.S. ___, 117 S.Ct. 1693, 137 L.Ed.2d 820 (1997); *Foy v. Berea*, 58 F.3d 227, 239 (6th Cir. 1995) (6th Circuit more likely to now apply "deliberate indifference" standard rather than "gross negligence" standard); *Williams v. Denver*, 99 F.3d 1009, 1014-1015 (10th Cir. 1996) ("shocks the conscience"); *Fagen v. Vineland*, 22 F.3d 1296, 1306-1307 (3d Cir. 1994) (en banc) ("shocks the conscience"); *Temkin v. Frederick County Commissioners*, 945 F.2d 716, 720 (4th Cir. 1991) ("shocks the conscience"), cert. denied, 502 U.S. 1095, 112 S.Ct. 1172, 117 L.Ed.2d 417 (1992); and *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986) ("shocks the conscience").

In *Lewis*, the Court held that only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience necessary for a due process violation. The deputy's response to the motorcycle driver's lawless behavior in driving at high speed, ignoring another police officer's attempts to stop the motorcycle, and speeding off does not shock the conscience where there is no reason to believe the law enforcement officer held an improper or malicious motive.

The Court's holding in *Lewis* is consistent with the clearly established law in the Tenth Circuit regarding

claims that executive decisions by public officials violated an individual's Fourteenth Amendment right to substantive due process. The Court in *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 197, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989), concluded that as a general matter, a state's failure to protect an individual against private violence does not constitute a violation of the Due Process Clause. The Tenth Circuit has interpreted *DeShaney* as carving out two exceptions to this rule: (1) the special relationship doctrine; and (2) the danger creation theory. *Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995), cert. denied, ___ U.S. ___, 116 S.Ct. 924, 133 L.Ed.2d 853 (1996).

The *Uhlrig* court turned to this Court's decision of *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992), for guidance in considering the scope of substantive due process violations. *Uhlrig*, supra, 64 F.3d at 573. *Uhlrig* cited *Collins* for the proposition that the standard for judging a substantive due process claim is whether government action would " 'shock the conscience' of federal judges." *Id.* See also *Collins*, supra, 503 U.S. at 128, 112 S.Ct. at 1070. *Uhlrig* states that to "shock the conscience" means the conduct must involve a degree of outrageousness and a magnitude of potential harm or actual harm that is truly "conscience shocking." *Uhlrig*, supra, 64 F.3d at 574.

Despite outward appearances resulting from the use of the term to define the term, the "shock the conscience" standard applied in the Tenth Circuit is not ambiguous or unclear for standing in a circular cul de sac. The decision in *Uhlrig* was not announced in a vacuum. The Tenth Circuit in *Medina v. City and County of Denver*, 960 F.2d

1493, 1499 (10th Cir. 1992), has provided clear directions concerning circumstances which suggest a "reckless" state actor might be liable for the actions of a third party. *Medina*, supra, 960 F.2d at 1499. In *Medina*, suit was brought by a bicyclist, injured when he was struck by a suspected felon during a high speed automobile chase, against the municipality and law enforcement officers based on the claims they violated substantive due process by unnecessarily creating a dangerous situation and failed to protect him from the third party suspect.

The court determined that for purposes of Section 1983, it is not adequate to show that the defendant merely acted recklessly in disregard of a known risk to the public at large. *Medina*, 960 F.2d at 1496. Rather, the defendant's conduct must be directed toward the plaintiff. *Id.* Additionally, four prerequisites must also be present. *Id.* The court also noted that an act is reckless when it reflects a wanton or obdurate disregard or complete indifference to risk, for example, "when the actor does not care whether the other person lives or dies, despite knowing that there is a significant risk of death" or grievous bodily injury. *Id.* (citations omitted). Summary judgment was granted in favor of police officers on the basis of qualified immunity and also in favor of the city and county absent evidence of any policy or practice that amounted to deliberate indifference toward bystanders.

The alleged need to resolve conflict among the circuits or to resolve ambiguity between judges in the Tenth Circuit does not therefore constitute legitimate grounds to warrant the grant of a Writ of Certiorari in this case. The objective character of the substantive due process analysis provided by this Court in *County of Sacramento v.*

Lewis, supra, together with the Court's opinions in *Collins v. City of Harker Heights*, supra, and *Washington v. Glucksberg*, 521 U.S. ___, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997), is more than adequate response to this request by petitioners.

Moreover, to hold that all government conduct deliberately indifferent to life, liberty, or property violates the Due Process Clause as petitioners urge would require this Court to make the Fourteenth Amendment a font of tort law. This notion is completely at odds with the intent of the Framers as well as the repeated determinations of the Court. "Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels v. Williams*, 474 U.S. 327, 333, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). "[T]he Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation." *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 202, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989) (citations omitted).

The alleged need to resolve conflict between circuit courts is likewise unwarranted as a legitimate basis for calling upon this Court to revisit the doctrine of qualified immunity. It is beyond questioning that the parole officer in the instant case was acting in an official capacity as a public official within the scope of discretionary authority sufficient to establish his entitlement to the shield of Eleventh Amendment immunity in his official capacity, as well as the shield of qualified immunity afforded by *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed.2d 396 (1982),

and *Procunier v. Navarette*, 434 U.S. 555, 561-62, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978) (prison officials and officers are provided qualified immunity from damages for acts performed in the course of official conduct), in his personal or individual capacity. [App. A27-A30] Additionally, this Court's recent review of qualified immunity makes it abundantly clear that existing procedures available to judges are adequate for use in handling claims that involve examination of an official's state of mind, such as in the determination whether decisions, actions or conduct of public officials rise to a level of recklessness or deliberate indifference which "shocks the conscience." See *Crawford-El v. Britton*, No. 96-827 (U.S. Supreme Court, May 4, 1998).

V.

CONCLUSION

For the foregoing reasons – and particularly because the petition does not and cannot challenge the clearly correct rulings of the Kansas Supreme Court which in themselves support its decision in the instant case – this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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